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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 214

ANNA MARY WHITE,
Petitioner,

vs.

EVANSVILLE AMERICAN LEGION HOME ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Indiana.

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West's Indiana Law Encyclopedia, Volume 2, page 756, Section 674 19

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Indiana.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the Appellate Court of Indiana and the judgment of the Supreme Court of Indiana, dated and entered in this case on February 7, 1968 refusing to transfer for review from the Appellate Court of the State of Indiana the decision of the Appellate Court on November 8, 1967. A subsequent petition for rehearing was filed in the Supreme Court of Indiana and denied on the 21st day of March, 1968.

CITATIONS TO OPINIONS BELOW.

This controversy arose on February 26, 1953 and this case has been before the Indiana courts since 1954. The cause of action is thus more than fifteen years old. The case has been appealed to each of the appellate courts of the State of Indiana on three separate occasions. The first appeal to the Indiana Appellate Court found the Indiana

Appellate Court divided four to four and the cause by virtue of said fact was transferred to the Indiana Supreme Court. This order is re-printed in the Appendix as Appendix A. On transfer the Indiana Supreme Court, Evansville American Legion Home Association v. White (1958), 239 Ind. 138, 154 N. E. 2d 109, reversed. This opinion is re-printed in the Appendix as Appendix B. Thereafter, after trial, another appeal was made to the Indiana Appellate Court. This opinion of the court is reported in White v. Evansville American Legion Home Association (1965), ... Ind. App. ..., 207 N. E. 2d 820. This opinion is re-printed in the Appendix as Appendix C. Transfer to the Indiana Supreme Court was granted. The Opinion of the Supreme Court is reported in White v. Evansville American Legion Home Association (1965), ... Ind. ..., 210 N. E. 2d 845. This Opinion is re-printed in the Appendix as Appendix D. After the Fifth trial, appeal was again taken to the Indiana Appellate Court. The Opinion of the Court is reported Evansville American Legion Home Association v. White (1967), ... Ind. App. ..., 230 N. E. 2d 623. The Opinion is re-printed in the Appendix as Appendix E. Thereafter transfer was sought to the Indiana Supreme Court and denied. This denial is unreported but is re-printed in the Appendix as Appendix F. Petition for Rehearing was filed and denied. The denial of this Petition for Rehearing is also unreported and is re-printed in the Appendix as Appendix G.

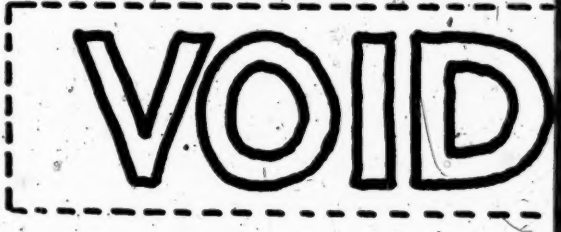
JURISDICTION.

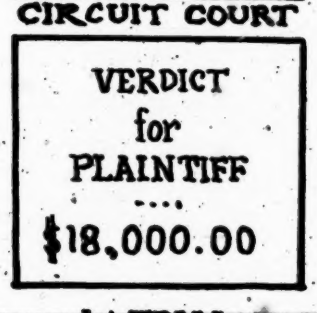
The judgment of the highest Court of the State of Indiana denying transfer to the Indiana Supreme Court was entered on February 7, 1968, and petitioner's Petition for Rehearing was thereafter filed in the Indiana Supreme Court and denied on March 21, 1968.

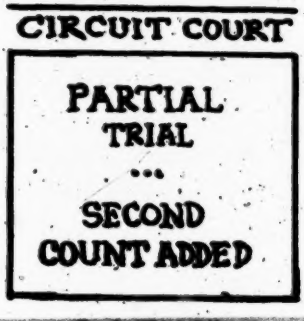
The jurisdiction of this Court is invoked under the provisions of 28 USC, § 1257 (3).

STATEMENT OF THE CASE.

For the convenience of the Court and in order to follow the chronology of this case, petitioner has inserted a summary chart of the legal steps taken in this case which is in its sixteenth year.







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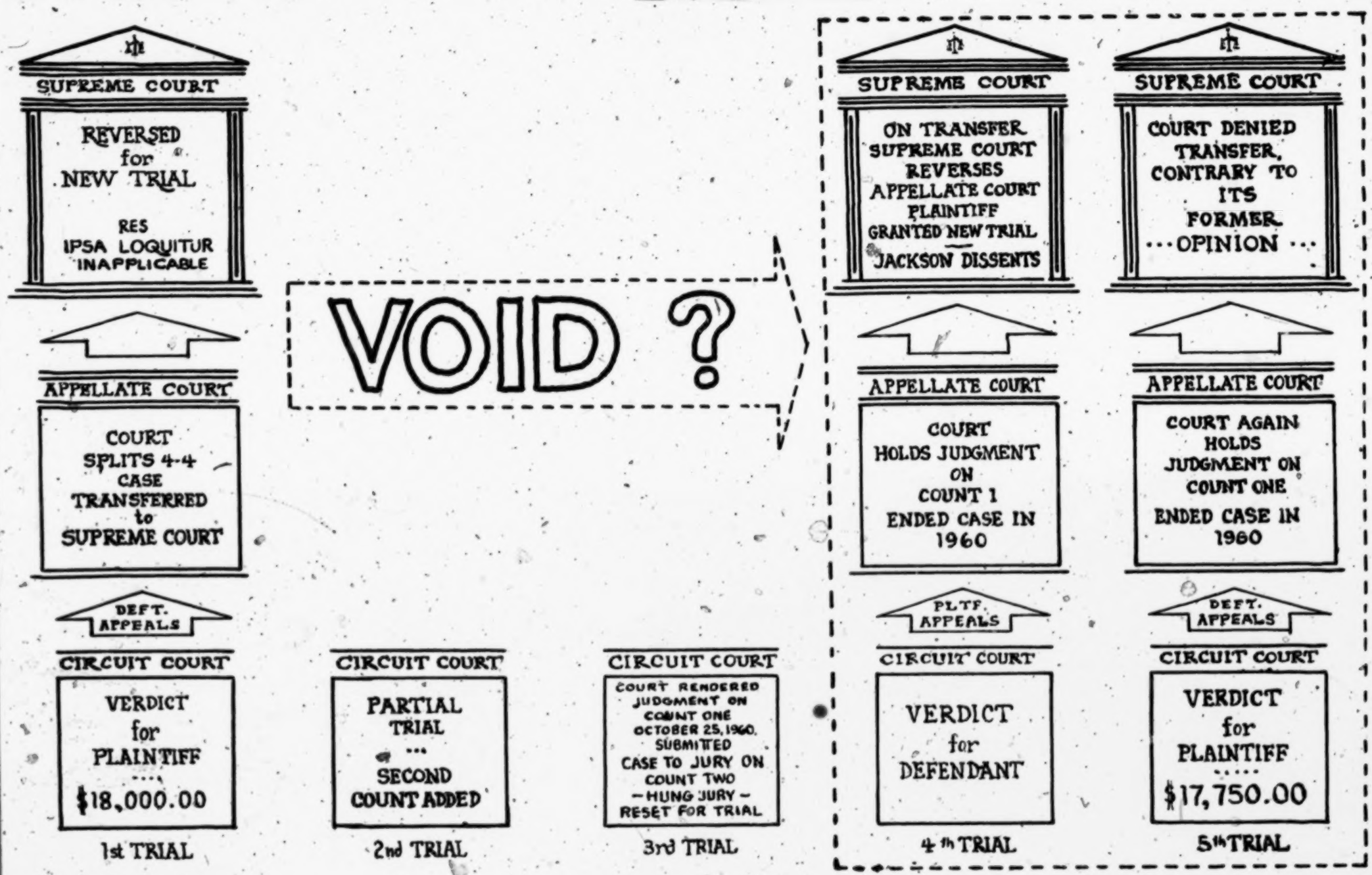

In order that the Court may be fully aware of all that has taken place, petitioner has inserted in the Appendix each of the opinions of the courts below, where reported, and the orders of the court where unreported. The same comprise the Appendices A to G.

The Court's attention is directed to the above referred to chart which summarizes the chronology of the case through each trial and appeal and the action taken by the court at each step in the proceeding. In an area outlined by broken lines on the chart into which an arrow and "void" has been directed, we call the Court's attention to the vast amount of legal action which the courts now call useless and void action taken in this case since October 25, 1960. It is significant that a portion of this now "void" procedure was participated in, and done under the authority and direction of the Indiana Supreme Court.

The chart shows that this petitioner has been put to much expense and has had her Indiana Supreme Court ordered new trial taken away. The rulings of the Indiana Appellate Court in 1967 and the failure of the Supreme Court of Indiana to act in 1968 apply unconstitutionally and unconscionably retroactive to October 25, 1960.

Suit Commenced.

This suit was brought by the petitioner, Anna Mary White, a fee-paying guest at a Bingo sponsored by the defendant, Evansville American Legion Home Association, to recover damages for an intervertebral disc injury sustained by her on February 26, 1953, when one of respondent's chairs collapsed when petitioner attempted to sit upon same.

First Jury Trial—Trial Court.

The petitioner filed her lawsuit in only one count, or as called in Indiana, one paragraph of complaint, based upon

the theory of res ipsa loquitur. The plaintiff recovered judgment in the trial court for the sum of $18,000.00.

First Appeal to Appellate Court.

The American Legion appealed the judgment to the Appellate Court of Indiana, which court, being split four to four and unable to agree upon a decision, the case was, under Indiana law, automatically transferred to the Supreme Court of Indiana, which is the highest court of Indiana (Appendix p. A-1).

First Appeal to Supreme Court of Indiana.

The Supreme Court of Indiana held res ipsa loquitur was not applicable under the facts in the record before it and reversed the case and ordered a new trial. (Evansville American Legion Home Association v. White, ... Ind. ..., 154 N. E. 2d 109) (Appendix pp. A-2—A-5.)

Second Jury Trial—Trial Court.

At the second trial petitioner sought to prove that respondent's chair collapsed as a result of specific acts of negligence and sought to introduce additional evidence not presented at the first trial, which petitioner's counsel thought made out a case under the doctrine of res ipsa loquitur. The trial court held that since the petitioner had not filed a count of complaint alleging specific acts of negligence, she could not prove specific acts of negligence. However, the trial court discharged the jury and continued the case, with leave for the petitioner to file an additional paragraph of complaint based upon specific acts of negligence, which second paragraph was filed.

Third Jury Trial—Trial Court.

At the conclusion of petitioner's evidence in chief at the third trial of this cause, the respondent filed simul-

taneously motions for a directed verdict as to both counts one and two of petitioner's complaint. The trial court held that there was not sufficient evidence to submit to the jury the issues presented on the first paragraph of complaint (res ipsa loquitur) and sustained the respondent's motion to direct the jury to return a verdict for the respondent on the first paragraph of complaint only. The court on October 25, 1960, rendered judgment on this count. The trial court at the same time denied respondent's motion directed to the second paragraph of complaint. The parties continued with the trial and respondent introduced evidence, the court submitted the cause of action to the jury on the issues presented by the second paragraph of complaint and respondent's answer thereto, and this third trial ended in a hung jury. In the court's entry, the court rendered a judgment for the respondent only on the said first paragraph of complaint based upon res ipsa loquitur and reset the case for trial based upon the second paragraph of complaint, which was confined to specific acts of negligence.

In view of the fact that the appellate courts of Indiana have held that every legal step taken in this case subsequent to the rulings of the court on October 25, 1960, are completely null and void because of the action of the trial court in directing a verdict on one count of the complaint, we here below set out the pertinent parts of the trial court's entry covering the court's action in this connection. This entry conclusively establishes that there was no intention of the trial court to deprive this petitioner of her right of trial, or right of action, on the remaining count of her complaint and that no such contention was made by the respondent at said time. Respondent made no objection at said time to the continuance of the trial on count two, to the subsequent resetting for trial, and in fact did not raise any question until approximately eight months after the cause had been submitted to the

jury. Said entry, omitting caption and other formal parts, is as follows, to-wit:

> "And now at the conclusion of the introduction of evidence in chief for the plaintiff, the defendant files its written motion requesting the court to direct the jury to return a verdict for said defendant on the amended complaint as amended by interlineation and tenders with said motion and request the defendant's instruction numbered A, which said instruction is in writing and is tendered as a part of said motion and now the Court sustains said motion of the defendant and indicates to the parties that it will give to the jury a peremptory instruction, instructing and directing the jury to find for the defendant on the amended complaint as amended by interlineation.
>
> "And now at the conclusion of the introduction of evidence in chief for the plaintiff the defendant Evansville American Legion Home Association files its written motion requesting the Court to direct the jury to return a verdict for said defendant on paragraph two of amended complaint for damages and personal injuries and tenders with said motion and request the defendant's instruction numbered A-1, which said instruction is in writing and is tendered as a part of said motion and said motion is now by the Court overruled and now the Court refuses to give to the jury said instruction numbered A-1 so tendered and requested by said defendant and to the refusal of the Court to give to the jury said instruction numbered A-1 the defendant at the time excepts." (Tr. of record in 1965 Appeal—Appellate Court No. 19999, Supreme Court No. 30852, pp. 218, 219.)

Fourth Jury Trial—Trial Court.

Approximately eight months after the third trial and at the fourth trial, the respondent contended for the first

time that since the trial court had rendered a judgment on petitioner's first paragraph of complaint, this was a final judgment on the entire cause of action, which ended the case and precluded a further retrial of same. The trial court overruled this contention and the jury returned a verdict for the defendant on the remaining paragraph of complaint.

Second Appeal to Appellate Court.

The petitioner then appealed on errors occurring during the trial to the Appellate Court of Indiana and the respondent filed cross-errors contending that the said action of the trial court in directing a verdict for the respondent on one paragraph of complaint and rendering judgment thereon was a final judgment which ended the case, despite the fact that the said trial court refused to direct a verdict on the remaining paragraph of complaint. The Appellate Court sustained respondent's said contention, and held that the trial court's action in directing a verdict on the one paragraph of complaint was a final judgment which had ended the case October 25, 1960. (Anna Mary White v. Evansville American Legion Home Association, ... Ind. App. ..., 207 N. E. 2d 820. Cross-errors opinion p. 841.) (Appendix pp. A-6—A-52.)

Second Appeal to Supreme Court of Indiana.

The petitioner then appealed to the Supreme Court of Indiana to transfer the case to that court and to reverse the Appellate Court's opinion and grant the petitioner a new trial. The Supreme Court did grant said transfer and appeal and assumed jurisdiction from the Appellate Court, **reversed the said Appellate Court's opinion and granted the petitioner a new trial.**

The Supreme Court held that errors had been committed during the course of the trial, specifically as to erroneous instructions that were given to the jury. Re-

spondent's contention that there was a final judgment was likewise raised in the Supreme Court as a bar to petitioner's right to proceed further. This contention was adopted by only one judge, who dissented on this basis. (Anna Mary White v. Evansville American Legion Home Association, ... Ind. ..., 210 N. E. 2d 845.) (Appendix p. A-37.) The opinion states:

> "Judgment reversed with instructions to sustain the motion for new trial." (Appendix p. A-58.)

Fifth Jury Trial—Trial Court.

Pursuant to the order of the highest court of Indiana, the petitioner's cause was again submitted to a jury at the fifth trial of this cause of action and she again recovered a judgment against the respondent, this time in the amount of $17,750.00. Thereafter the respondent again appealed to the Appellate Court.

Third Appeal to the Appellate Court.

Contrary to the opinion of the Supreme Court of Indiana in Anna Mary White v. Evansville American Legion Home Association, ... Ind. ..., 210 N. E. 2d 845 (Appendix p. A-53), the Appellate Court again in 1967, the same as it did in its opinion in 208 N. E. 2d (Appendix p. A-63), held that the trial court's action in 1960 in directing the jury to find for the respondent on paragraph one of complaint resulted in a final judgment of the entire cause of action, even though there was a remaining or second paragraph of complaint. This Appellate Court decision thereby wiped out petitioner's judgment of $17,750.00 and ended the entire cause of action as of October 25, 1960 (Appendix p. A-77).

Third Appeal to the Indiana Supreme Court.

The petitioner then duly but unsuccessfully sought transfer of the case to the Supreme Court of Indiana to

reverse the erroneous decision of the Indiana Appellate Court. Petitioner then duly filed Petition for rehearing to the Supreme Court, which petition was likewise denied. In the Supreme Court, petitioner pointed out wherein she was being deprived of her federal constitutional rights as a result of the action of the Appellate Court of Indiana and the inaction of the Supreme Court of Indiana.

HOW FEDERAL QUESTION PRESENTED.

Petitioner raised federal constitutional questions in numerous places in the state courts below, the last being by way of petitioner's Petition for Rehearing filed in the Indiana Supreme Court and the brief on same and argued that the taking of her cause of action and her judgment deprived her of due process of law under the Fourteenth Amendment of the Constitution of the United States as herein urged.

CONSTITUTIONAL PROVISIONS INVOLVED.

Fourteenth Amendment of the Constitution of the United States.

QUESTIONS PRESENTED.

I.

In 1965, on the second appeal of this case to the Appellate Court of Indiana, that court held that the action of the trial court on October 25, 1960, in merely directing the jury to return a verdict for the respondent on only one count of petitioner's complaint was a final judgment of the entire cause of action which ended the case as of said date. This ridiculous and absurd holding was made despite the fact that there was pending at said time another count of petitioner's complaint in which the trial

court refused to direct a verdict for the respondent but submitted the cause of action to the jury on said remaining count of complaint.

On an appeal by the petitioner for a transfer of the cause of action to the Supreme Court of Indiana, said Indiana Supreme Court granted said transfer from the Appellate Court and reversed the Appellate Court and ordered a new trial.

Thereafter, following the mandate of the Supreme Court, there was another trial and at this new trial the petitioner received a verdict from the jury in the amount of $17,750.00.

The respondent then appealed from this judgment to the said Appellate Court and said Appellate Court again rendered its **identical** decision that this cause of action ended October 25, 1960.

The petitioner then again sought transfer to the Supreme Court but the Supreme Court this time denied said transfer and refused to abide by its own decision and refused to enforce the law of the case that it had previously laid down. Instead, the Supreme Court permitted the Appellate Court, an inferior court, to take away the petitioner's right of trial that had previously been granted. Petitioner has thereby been denied the fruits of the order of the Supreme Court in granting her a new trial, and she has been deprived of her judgment in the amount of $17,750.00, and burdened with the expense of a senseless trial and a senseless appeal to the Appellate and Supreme Courts.

Was not the refusal of the Indiana Supreme Court to again accept transfer of this case and enforce its order of a trial of this cause a denial of petitioner's rights under the due process clause of the Fourteenth Amendment of the Federal Constitution?

II.

Was not petitioner denied due process of law under the Fourteenth Amendment of the Constitution of the United States by the highest courts of the State of Indiana when they denied petitioner her right of trial of her personal injury cause of action upon count two of her complaint which was based upon a different theory than that set forth in count one of the complaint, where the trial court directed the jury to return a verdict solely on count one of her complaint and proceeded to trial on said count two?

III.

In 1965, the Supreme Court of Indiana, the highest court of the state, in an appeal by petitioner, reversed the Appellate Court and established the law of this case which granted petitioner a new trial. On the retrial the petitioner obtained a judgment and the respondent appealed again to the Appellate Court and that court, an inferior court, although it found no error in the trial, held that the petitioner was not entitled to a new trial and that the case ended in 1960, and thereby refused to follow or abide by the law of the case as established by the Supreme Court. The petitioner was denied an appeal or transfer to the Indiana Supreme Court. Was not the petitioner denied due process of law under the Fourteenth Amendment of the Constitution of the United States by the failure of the highest courts of this state to follow the law as laid down by the Supreme Court?

IV.

Has due process been denied to this 75-year old woman who after fifteen years in litigation is now told that her lawsuit had been adjudicated eight years ago despite two subsequent jury trials and appeals to the Indiana Appellate Courts which now hold she wasn't entitled to any legal remedy after 1960?

REASONS FOR GRANTING THE WRIT.

I.

This notorious tort case is perhaps one of the best known, and certainly the oldest and most litigated case in the State of Indiana. During its more than fifteen years since the date of the accident it has encountered many novel legal obstacles. It started out as a simple negligence case. A chair collapsed. By all respectable authority it was the classic example for the application of res ipsa loquitur. Proceeding on this theory the petitioner originally obtained a jury's verdict, but completely out of line and contrary to the many similar decisions throughout the country, the Indiana Supreme Court reversed the judgment, holding that res ipsa loquitur did not apply because the petitioner, when she attempted to sit upon the chair, had control of same.

When this matter was presented on appeal the second time the Appellate Court erroneously, and without any legal precedent whatsoever, made the astounding holding that when the trial court withdrew from the jury's consideration the first count of petitioner's complaint it constituted a final judgment on the entire cause of action, despite the fact that count two was still pending and despite the fact that the trial court did not consider its action to be a final judgment, but on the contrary it submitted the cause of action to the jury on count two.

The Supreme Court transferred the case to that court and reversed the Appellate Court's decision and in reversing same made the following order:

> "Judgment reversed with instructions to sustain the motion for a new trial" (Appendix p. A-58).

On this new trial, which was the fifth trial, the jury again returned a verdict for the petitioner.

Respondent again appealed this judgment and strangely the Appellate Court refused to abide by the law of the case that was laid down by the Supreme Court in giving petitioner a new trial but contrary to, and in defiance of, the said highest court of this state the Appellate Court again held that this cause of action ceased to exist because of the so-called final judgment of October 25, 1960. This, of course, meant that in 1965, when the Supreme Court ordered a new trial for the petitioner, according to the decision of the Appellate Court the case had been dead and ceased to exist five years prior thereto. Although the petitioner then duly and timely appealed again for the Supreme Court to transfer the case to that court so that it could enforce the law of the case that it had itself previously laid down, said court refused said appeal and transfer and permitted the lower or inferior court, that is the Appellate Court's decision, to stand. This, of course, completely wiped out petitioner's judgment. Not only did this wipe out petitioner's judgment but it humiliatingly subjected her to the burden and expense of an extended jury trial and appeal to each the Appellate and Supreme Courts, on a case that is now claimed ceased to exist since October 25, 1960. How could there be any more abuse of due process of law? Petitioner's judgment was confiscated.

Her plight in having her judgment taken away from her in the extraordinary and peculiar maneuvering in which it was done is unique in the annals of legal history. Certainly there can be no more basic right under our federal constitution than the right of an individual to have her day in court. The right of trial by jury is likewise a foundation stone in our system of jurisprudence. As important as said constitutional rights are the necessity and importance of preserving these rights is not merely what is involved in this case. What occurred in this case is infinitely more important and provoking.

These said constitutional rights were provided the petitioner when the Supreme Court of Indiana overruled the Appellate Court and granted the petitioner her new trial—her right to trial by jury—her right to have her day in court. The petitioner went through her Supreme Court granted new trial at great expense and she again obtained her judgment and on appeal by respondent her judgment was again taken away from her. Unbelievable as it may seem, the judgment was not taken away from her for any error that occurred in this latest trial and the judgment was not taken away by the highest court of the State of Indiana but on the contrary it was taken away from her by a lower and inferior court. The pitiful and indefensible part about it is the fact that the highest court of the State of Indiana has refused to do anything about it, despite the fact that it was said Supreme Court that granted the new trial and despite the fact that when it granted the new trial it also overruled the inferior Appellate Court on the very grounds that it now permits said lower court to usurp and confiscate petitioner's judgment.

What kind of a hide and seek game is this? We submit that it is a mockery of justice and an unconscionable and disgraceful violation of petitioner's right to have a jury trial and to have her day in court as guaranteed under the Fourteenth Amendment of the Constitution of the United States.

It is not only the petitioner who suffers under the facts of this case but it is the legal profession and the courts who must suffer. Sixteen years in the courts for a simple case that should have been disposed of in a short period of time. How can the general public or this petitioner understand that the order granting a new trial doesn't mean a thing? How can a lower court repudiate the Supreme Court? How can parties accept the failure of a

court to act in the face of its prior decision which reverses the Appellate Court of Indiana? Is it not time for this cat and mouse game to cease?

The Appellate courts could not find any error in the trial of this cause. Incredible as it may seem, the result reached required the higher courts of this state to go back retroactively to a period of eight years previously in order to discard petitioner's cause of action. If this were a criminal case, we submit this Court would readily review a statute which sought to reach such ex post facto results. The only difference here is what the courts have done ex post facto to this petitioner. This result, we say, is unconscionable and unconstitutional. We appeal to this Court to require the Indiana courts to treat fairly all of its citizens.

II.

The unheard of action of the Appellate Court in holding that there was a final judgment which ended this case on October 25, 1960, merely because there was a failure of one count of the two count complaint is without precedent.

In Indiana where there are different theories of a cause of action, each theory may not only be stated in a separate count or paragraph of complaint, but this procedure is specifically required by the Statute of Indiana. Burns' Indiana Statutes, Volume 2, Part 1, Section 1004, subsection 3, provides as follows:

> "Where the complaint contains more than one cause of action each shall be separately stated in a separate paragraph and numbered."

Volume 1, Lowe's Revision of Works' Indiana Practice, Page 489, Section 13.67, says:

> "The rule is very liberal in this State in allowing the pleader to state his action in various forms in

different paragraphs, and he will not be required to elect on which paragraph he will go on trial. He may state his cause of action on them all, **and recover on whichever paragraph or paragraphs the evidence will warrant.**" (Emphasis ours.)

In Bruck v. State ex rel. Money (1950), 228 Ind. 189, 204, 91 N. E. 2d 349, this court clearly restated the principle that a pleader does not have to prove every paragraph of complaint but may recover on any one paragraph which is sustained by the evidence. On page 204 of the official report, the court said:

> "In this jurisdiction the rule is that where a plaintiff has a single right of recovery that may rest upon one ground or another, according to the facts to be shown by the evidence, and he cannot safely foretell the precise nature and limits of the defendant's liability to be developed upon the trial, he may state his right of action variously in different paragraphs and go to trial on all of them, and recover only on such paragraph or paragraphs as the evidence will warrant."

A failure to make out a case based upon one count or paragraph of complaint and a resulting judgment thereon has no effect whatsoever upon any of the remaining paragraphs or counts of complaint. See Dagley v. Armstrong Rubber Co., 344 F. 2d 245, 250 (1965), where the 7th Court of Appeals said:

> "Defendants assert that the dismissed warranty counts were duplicitous of the negligence counts which were submitted to the jury and thus plaintiffs have had their day in court and should not be permitted to be heard on the same facts and issues 'under a different label'. We do not agree.
>
> • • • • • • •

"We hold that the jury verdict and judgment on the negligence counts were not res judicata as to the warranty counts."

In the instant case, the Indiana Appellate Court held just the exact opposite from the holding in the above Dagley case. We thus see that the decision of the Appellate Court of Indiana, in holding that the action of the trial court in directing the jury to return a verdict for the respondent on one paragraph or count of complaint and the rendering of judgment thereon on the 25th day of October, 1960, was a final judgment that ended the entire cause of action, was erroneous. Said Appellate Court thereby not only deprived the petitioner of her right of trial on her cause of action but said decision also deprived her of her judgment of $17,750.00 and burdened her with the expense and worry of extensive useless litigation.

The Appellate Court in attempting to support its said erroneous and unprecedented decision cited ten Indiana cases, and none of these cases has even a semblance of analogy to the case at bar. Each of the cases cited involves a situation where a plaintiff had failed on one theory of a cause of action and then **subsequently and at a later date filed another and entirely new case in which the said plaintiff, against the said defendant, pursued another theory or count.** Of course, a plaintiff cannot try a case piecemeal. The petitioner was denied due process when she was permitted to try only one count of her two count complaint.

After the trial court withdrew the first count of plaintiff's two count complaint from the consideration of the jury, the respondent's attorneys made no objection whatsoever to the fact that the court at the same time overruled respondent's similar motion as to the second count of complaint and proceeded with the trial of the cause of

action on the second count of complaint. Another trial judge in this cause of action made the same ruling. The first time the respondent made any objection to the further trial of the cause of action was approximately eight months later on June 20, 1961, and after the case had been submitted to a jury previously by another trial judge. Obviously, respondent had already recognized the validity of the proceeding on the second count of complaint and acquiesced in the proceeding. Of course, the respondent had to raise the question at the time and not eight months later in a subsequent proceeding.

III.

When the Indiana Supreme Court reversed the Appellate Court and granted the petitioner a new trial, that became irrevocably the law of the case. That law could not be changed by either the Appellate or Supreme Court in this particular case and the parties had a right to rely on said law; as was said in West's Indiana Law Encyclopedia, Volume 2, page 756, Section 674: "An appellate decision becomes the law of the case and governs the case throughout all its subsequent stages even though erroneous." When the Supreme Court granted a new trial it put no restrictions on it whatsoever. The case was, therefore, to be tried de novo. In other words, the petitioner had a right to try the case with all the rights she had in her very first trial. The fact that the Supreme Court had previously reversed the case originally because res ipsa loquitur did not apply to the facts that were then before the Supreme Court did not prevent the petitioner from retrying the case based upon res ipsa loquitur with her additional evidence. If she failed on the retrial to again make out a case based upon res ipsa loquitur this could not possibly have any bearing upon or prejudice her right to proceed on her count two which was based upon spe-

cific acts of negligence. The Appellate Court's holding to the contrary was a denial of petitioner's right of a new trial which was granted by the Supreme Court.

The fact cannot be denied that when the Indiana Supreme Court granted the petitioner a new trial in this ancient case in 1965, the said case had ceased to exist for five years prior thereto if the opinion that confiscated petitioner's judgment is permitted to stand. The area marked "void" and outlined on the chart in this Petition demonstrates this result.

This ludicrous position that the highest court of the State of Indiana has placed itself in will attempt to be defended and excused by the respondent by the unfounded argument that the Supreme Court did not **consider** respondent's cross-errors that raised the question of the finality of the judgment on count one of petitioner's complaint. No argument, however, could be more absurd and further from the facts. This matter was presented to the Supreme Court by cross-errors, numerous briefs, oral arguments, the Appellate Court's opinion in 207 N. E. 2d 820, Petition to Transfer, etc., etc. In all, it was presented in eleven separate and distinct ways. The fact of the matter is that one of the Justices of the Supreme Court, Justice Jackson, even wrote a dissenting opinion on the very question. In the decision of this case in 210 N. E. 2d 845, page 848 (Appendix p. A-59), Judge Jackson on the very question said:

> "I am unable to agree with the conclusion reached by the majority opinion herein. For that reason I dissent thereto."

And on page 850 concluded:

> "* * * the doctrine of res judicata applies and appellant herein cannot recover."

It will thus be seen that there are absolutely no facts whatsoever to substantiate the argument that the Indiana Supreme Court did not consider the matter. The only reason that the respondent has advanced for its ridiculous contention is the fact that in the majority opinion it does not mention this question. This, of course, was not necessary. It was mentioned in the minority opinion. The higher courts of Indiana are under no duty to answer or decide every contention brought forth or to give an explanation or opinion on every point raised, regardless of merit, as this would inundate the court and the legal profession with redundant and unnecessary legal opinions.

The Court in Chicos v. State (1965), 210 N. E. 2d 363, 364, recently explained that it intentionally omitted the discussion of various questions arising in the record and stated:

> "We intentionally omitted from our discussion those 'questions arising in the record' which seemed frivolous, were not supported by substantial argument in the briefs or were to patently contrary to the well-established law of the state since a discussion thereof would merely constitute an unjustifiable encumbrance of the reported decisions of the state without making any contribution to the general body of the law."

And on page 366 said:

> "As previously stated, the above specifications of error were not previously considered by this court in its opinion but were omitted because they were patently without merit, and although the constitution provides that the court 'give a statement in writing of each question arising in the record' of such case, we are of the opinion that the law is so firmly established with regard to the specifications of error asserted by appellant that there is, in reality, no

substantial question with regard to such specifications and, therefore, that within a reasonable construction of the constitutional directive it was unnecessary that the court encumber the opinion with a discussion of this voluminous subject matter."

Respondent has previously contended and we anticipate will continue to contend that the action taken by the trial court on count one of the complaint, which it is contended ended the case October 25, 1960, could have been avoided in three different ways:

1. She could have withdrawn her count two prior to the time a directed verdict was entered on same.

2. She could have objected to the entry on same.

3. She could have appealed from the action of the court on same.

None of these reasons have any merit. We will answer them in order:

1. Petitioner was not obliged to give up her right to retry the case on count one. The former Supreme Court's opinion did not forbid this, but on the contrary, the case was to be tried de novo and the petitioner could not be prejudiced in any way by a failure to prove count one. Furthermore, petitioner had a right in the event of adverse decision, to have appealed to the higher courts the ruling on a dismissal of count one and was not required to give up this right of appeal.

2. There was no obligation or reason why the petitioner should have objected to the action of the trial court on count one because the trial court submitted the case to the jury on count two.

3. There was no possible way in which the petitioner could have appealed from the action of the trial court

concerning count one as the case was not at an end. The trial court submitted the case to the jury on count two. The only time that there could be an appeal from the action of the trial court on count one would be when the entire case was at an end in the trial court. It is very elementary that a case cannot be appealed piecemeal. In this connection it was said in Russell, Excr. v. McKinstry, et al. (1949), 119 Ind. App. 625, at page 629:

> "The law is well settled that appeals cannot be allowed by piecemeal. And, where a question is presented on a subsequent appeal which was necessarily involved in a former appeal and where the conclusion declared could not have been reached without expressly or impliedly deciding such question, the decision on the former appeal rules the case throughout all subsequent proceedings."

IV.

The Court of last resort in Indiana is the Supreme Court. In 1965 this court rendered a decision giving the petitioner a new trial and reversed the Appellate Court decision and thereby rejected respondent's cross-errors which urged the contention that this case ceased to exist October 25th, 1960. When the matter came before the Appellate Court a second time that court defiantly refused to permit the Supreme Court's ordered new trial to stand and again rendered a decision that this case ended October 25, 1960, and thereby reversed the petitioner's judgment. Incredibly the Supreme Court has refused transfer of the case and has refused to disturb the Appellate Court's said second decision and has thereby refused to enforce its own decision granting petitioner's right to a new trial. This has taken away from the petitioner the fruits of the Supreme Court decision granting her a new trial. She has thereby been deprived the due process of

law contrary to the Fourteenth Amendment of the Constitution of the United States.

This petitioner has had more than her share of legal troubles during her fifteen-year old struggle through the courts of Indiana against this very powerful and omnipotent defendant, but the unexplainable question is **Why did the highest tribunal of this state taunt this old lady by granting her a new trial and then taking it away from her for no reason at all?** The Supreme Court has never answered this question and the respondent cannot answer it. No type of punishment could be greater than that inflicted by the highest court of this state upon this citizen. In her struggle through the years the petitioner has encountered many set-backs in her effort to pursue her cause of action and she finally succeeded in reversing the Appellate Court and thereby won her long struggle for her coveted new trial by Indiana's Supreme tribunal. But, what a mockery! What a shameful and hollow victory it turned out to be!

We submit that the Appellate Court's decision that there was a final judgment that ended this entire cause of action in this case merely because there was a failure of one count of a two count complaint has no support of any legal precedent. Then after the Supreme Court reversed the Appellate Court and granted petitioner's new trial and thereby rejected the Appellate Court's decision it seemed incomprehensible that the Appellate Court would come right back and challenge and defy the Indiana Supreme Court by writing the same identical opinion. As astonishing as the Appellate Court's actions have been and as great as has been the violation of the petitioner's constitutional rights to a trial of her cause of action, these violations by said Appellate Court cannot compare to the wrongs, injustices and additional damages that the Supreme Court has inflicted upon this petitioner. At

least the Appellate Court has been consistent, even though it has been consistently wrong in both decisions, but the unbelievable fact is that after the Indiana Supreme Court reversed the Appellate Court and granted the petitioner her new trial, said high court has repudiated its very own decision when the very cause of its repudiation had been previously rejected by it. How is the layman to understand this strange procedure?

CONCLUSION.

Petitioner has shown that the Appellate Court of Indiana erroneously held this cause of action ceased to exist October 25, 1960, and that then the Supreme Court of Indiana accepted transfer of the case, reversed the Appellate Court's said decision and ordered a new trial. The new trial ordered by the highest court of this state resulted in a verdict for the petitioner in the sum of $17,750.00.

Respondent appealed from this judgment and although the Appellate Court failed to find any error in the trial court or any of the proceedings since the Supreme Court reversed the Appellate Court's said decision, the Appellate Court nevertheless defiantly contrary to the Supreme Court's decision and contrary to petitioner's **right of trial** as ordered by the Supreme Court, continued to hold and render its same decision that this case ended October 25, 1960.

Inconceivable as it may seem, however, the Supreme Court refused to again accept transfer of the case to enforce its own decision which ordered petitioner's new trial, but instead permitted the Appellate Court to confiscate petitioner's judgment and burdened her with what is now contended to be void and useless litigation since October 25, 1960.

We urgently submit that this denial of petitioner's right of trial, as ordered by the Supreme Court of Indiana, was a flagrant denial of petitioner's rights as guaranteed by the due process clause of the Constitution of the United States.

Wherefore, petitioner respectfully petitions this Court for a Writ of Certiorari in this notorious and ancient case.

Respectfully submitted,

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JOHN H. JENNINGS,

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Attorneys for Petitioner.

APPENDIX A.

ORDER.

Evansville American Legion Home Association

v.

Anna Mary White.

No. 18940.

You are hereby notified that four judges failing to concur the Appellate Court has on this day ordered this case transferred to the Supreme Court of Indiana under §4-209, Burns' 1946 Replacement. Transferred to Supreme Court No. 29642. Royse, P. J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

Witness my name and the seal of said Court, this 26th day of February, 1958.

Mabel E. Lyons,
Clerk Supreme and Appellate Courts.

APPENDIX B.

OPINION.

The State of Indiana.

154 N. E. (2) 109.

In the Supreme Court,

On the 2nd day of December, 1958, being the 8th Judicial day of said November Term, 1958.

Hon. Frederick Landis, Chief Justice,

Hon. Harold E. Achor, Hon. Norman F. Arterburn, Hon. James A. Emmert, Hon. Arch N. Bobbitt, Associate Judges. } No. 29642.

In the Case of Evansville American Legion Home Association, Appellant, vs. Anna Mary White, Appellee. } Appealed From the Warrick Circuit Court.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Arterburn, Judge.

Emmert and Achor, JJ., concur.

Landis, C. J., and Bobbitt, J., concur in result.

This case is here on transfer from the Appellate Court.

The appellee, Anna Mary White, claims damages for personal injuries received when a folding chair collapsed

upon which she was seating herself at a bingo game conducted by the appellant. The jury returned a verdict of $18,000.00 for the appellant.

The first and major question raised is the sufficiency of the evidence to sustain the verdict.

The pertinent parts of the evidence show that the appellant, Mrs. White, and her sister attended a bingo game on the evening of the accident and bought tickets from the appellant for that purpose. After entering the hall she selected a chair at a table and pulled it out and sat down on it and the chair immediately collapsed. The chair involved was a metal folding chair put together with rivets and welding. An examination of the chair after the accident showed that the curl on the end of the rivet holding the two right legs of the chair together had been sheared or broken off. The place where the curl had come off was bright and shiny, not oxidized or corroded. It showed a recent shearing off. We do not find any dispute in the evidence as to this fact.

Experts testified that the type of chair used would withstand an impact or shock load of 500 pounds before breaking and would hold 250 pounds with safety. The appellant testified she weighed 170 pounds at the time of the accident.

Appellant claims that an inference of negligence arises in this case under the doctrine of *res ipsa loquitur*, which the jury may consider; that she need make no further proof of negligence. It is urged that the chair was the property of and in the care of the appellant and the doctrine is applicable accordingly.

This is not a case of *res ipsa loquitur*. The chair was not in the exclusive possession and control of the appellant. The chair broke at the time it was in the actual control of the appellee. The failure and breaking occurred

within the open observation of the appellee and view of other witnesses. No complicated machinery was involved which was enclosed, locked up, or the operation of which was excluded from the view of the appellee.

The doctrine of *res ipsa loquitur* is based to a large extent upon the ground that the evidence or facts concerning the operation of the injuring agency are within the special knowledge and control of the defendant and the injured party does not have free access to such information. Such is not the case here.

N. Y., Chicago & St. L. RR. Co. v. Henderson (1957), 237 Ind. 456, 146 N. E. 2d 531;
Hook v. National Brick Co. (C. C. A. 7th, 1945), 150 Fed. 2d 184;
3 Cooley on Torts (4th Ed.), Sec. 480.

The only question remaining is whether there is any evidence of negligences proximating causing the injury. We believe there is not. In oral argument before us, counsel for appellant was not able to point out any specific item of negligence. It was urged, however, that the inspection and testing of the chairs before their use should have been more thorough. There is no independent duty to make inspection upon which negligence can be based. The duty to inspect arises from knowledge of possible defects or their reasonable probability. There is no showing here that the appellant had any previous knowledge of the defective chair or had cause to suspect the chairs were defective. The undisputed evidence is to the contrary. The evidence shows that thousands of people had used the chairs, including the one in question, during a period of some seven years without a single incident where one had collapsed while in use at the hall. The testimony also showed that when the chairs were set up for use on the evening of the injury, as each chair was unfolded, its stability was tested by the workman "by

bearing down on them". There is no showing of actual or constructive knowledge on the part of appellant which would create a duty to make an inspection of the minute character that would have been required here to find the flaw which apparently was latent. The appellant was not an insurer against injury.

F. W. Woolworth Co. v. Jones (1955), ... Ind. A. ..., 130 N. E. 2d 672;

Hook v. National Brick Co. (C. C. A. 7th, 1945), 150 Fed. 2d 184.

"A man cannot be held responsible on the theory of negligence for an injury from an act of omission on his part unless it appears that he had knowledge or reasonably was charged with knowledge that the act or omission involved danger to another."

38 Amer. Jur., Negligence, Sec. 23, p. 665.

Judgment is reversed with directions to grant a new trial.

Landis, C. J., and Bobbitt, J., concur in result.

Emmert and Achor, JJ., concur.

APPENDIX C.

OPINION.

Anna Mary White, Appellant,

v.

Evansville American Legion Home Association, Appellee.

No. 19999.

Appellate Court of Indiana, Division No. 2.

June 11, 1965.

* * * * * * *

John H. Jennings, Harold M. Wilson, Jr., Evansville, for appellant.

Bamberger, Foreman, Oswald & Hahn, Evansville, for appellee.

Smith, Judge.

This is an action brought by the appellant against the appellee for damages arising from personal injuries alleged to have been sustained as the result of negligence of the appellee in furnishing appellant with a defective chair in appellee's amusement hall.

This action is of long standing—it was originally filed in the Vanderburgh Probate Court in March 1954; and was afterwards venued to Warrick Circuit Court wherein the following proceedings were had.

The original complaint in one paragraph was amended, by interlineation, to supply a prayer for damages which had been inadvertently omitted from the complaint. The amended complaint charged that the appellee was a domestic corporation which owned a parcel of ground and an amusement hall located thereon in the City of Evans-

ville, Indiana, in which the appellee sponsored, among other things, Bingo games. The amended complaint specifically alleged that on February 26, 1953, appellant purchased a ticket from appellee to be used for the purpose of playing Bingo; and that upon entering the amusement hall, she attempted to seat herself upon a chair furnished by appellee, which chair immediately collapsed and fell, thereby causing her personal injuries. The amended complaint further alleged that the building and the collapsed chair were both owned by the appellee and were both under the exclusive control of the appellee; and that said cause of action was one which, in the ordinary course of things, would not have arisen except for the negligence of the appellee.

To this amended complaint, as amended by interlineation, the appellee filed its answer.

Upon appellant's amended complaint, as amended by interlineation, and appellee's answer thereto, this cause was tried the first time by a jury and a verdict was returned in favor of the appellant in the amount of $18,000.00, upon which verdict judgment was rendered and from which an appeal was taken to this Court. The cause was thereafter transferred by the Appellate Court to the Supreme Court of Indiana and the judgment of the lower court was reversed by the Supreme Court with instructions to the court below to grant a new trial.

The trial court thereupon granted a new trial and the cause proceeded a second time to trial on appellant's amended complaint, as amended by interlineation, and appellee's answer thereto. On the second day of said trial the appellant filed an additional paragraph of complaint. Upon the third day of said trial, and, upon appellee's motion to withdraw the submission of the cause from the jury, the court ordered that the jury be discharged, that the submission of the trial be withdrawn

from the consideration of the jury, and that the trial of said cause be continued.

Paragraph two of amended complaint, after repeating the allegations of the amended complaint, as amended by interlineation (paragraph one), in substance alleged that the chair in which the appellant attempted to seat herself was and had been in a defective condition in that the curl of the rivet supporting the right legs of the chair had completely chipped and worn away, that the cross-brace supporting the rear legs had become unwelded, and that the rubber tip fitted to the left front leg was missing. It charged appellee with four specific acts of negligence, namely: (1) in furnishing appellant with a defective chair when it knew, or in the exercise of reasonable care should have known, of the condition of the chair; (2) in failing to repair and maintain the chair; (3) in failing to test or inspect the chair; and (4) in failing to warn appellant of the defective condition of the chair.

The appellee filed a motion to strike certain parts of the second paragraph of the complaint which motion the court overruled. Thereafter the appellee filed a demurrer to said second paragraph of the complaint which also was overruled by the court.

The appellee then filed its first and second paragraphs of answer to appellant's paragraph two of the complaint. Paragraph one of the answer denied the material averments contained therein, and the second paragraph of answer specifically charged that the alleged cause of action stated therein was barred by the Statute of Limitations.

The appellant filed a reply to the second paragraph of the appellee's answer denying all of the material allegations therein.

Upon the issues presented by the amended complaint, as amended by interlineation (paragraph one), and para-

graph two of the amended complaint and the respective answers thereto, and over the objections of the appellee to the submission of the amended complaint, as amended by interlineation (paragraph one), the cause was submitted a third time for trial.

On the third trial, at the close of appellant's evidence in chief, the trial court sustained a written motion of the appellee to direct a verdict in favor of the appellee on the issues joined in the amended complaint, as amended by interlineation (paragraph one). The court, at the conclusion of all of the evidence, gave to the jury its written peremptory instruction directing the jury to find for the appellee on the amended complaint, as amended by interlineation (paragraph one), and the jury thereafter returned its verdict in favor of the appellee as directed by the peremptory instruction. Thereupon the appellee moved for judgment on the said verdict and the court rendered judgment thereon. No motion for a new trial was filed and no appeal was taken from this judgment.

As to the remaining issues as alleged and set forth in paragraph two of appellant's complaint and the answers of the appellee thereto, at the close of appellant's evidence in chief, the appellee filed its motion for a directed verdict which motion the trial court overruled. Thereafter the cause was submitted to the jury on paragraph two of the complaint, and the jury failing to reach a verdict, was thereupon discharged.

A change of venue from the judge was taken and, after qualification of a special judge, this cause was submitted the fourth time for trial. At this fourth trial, before the commencement of the trial and before the impaneling of the jury, the appellee filed its written objections to the impaneling of the jury, the submission of appellant's paragraph two of the complaint for trial and to any further proceedings being had in the trial of this cause. The court overruled said written objections and the cause was

thereupon submitted to trial before a jury on the issues presented by paragraph two of the amended complaint and the answers thereto.

The fourth trial resulted in a verdict and judgment for the appellee; from which judgment this appeal has been taken.

The sole error assigned by appellant, Anna Mary White, is that the trial court erred in overruling the motion for a new trial.

The appellant's motion for a new trial recites thirty-two specifications of error as follows: (1) specification number 1 alleges that the verdict of the jury is contrary to law; (2) in specifications number 2 to 29, both inclusive, the plaintiff contends that the trial court erred in giving to the jury certain instructions tendered and requested by the defendant; (3) in specifications numbered 30 and 31 the plaintiff maintains that the trial court erred in refusing to give two instructions tendered and requested by the plaintiff, the same being plaintiff's instruction number 5 and instruction number 6; and (4) in specification number 32 the plaintiff contends that the trial court erred in admitting into evidence defendant's Exhibit #3.

The appellant contends that the court erred in giving instruction number 4, which reads as follows:

> "The court instructs you that before the plaintiff can recover in this action *she* must prove by a preponderance of the evidence that—
>
> 1. The chair in question was defective to the extent that it was unsafe for public use, and
>
> 2. the defendant knew or in the exercise of reasonable care should have known that the chair was defective and unsafe for public use, and

3. the injuries sustained by the plaintiff, if any, were the proximate result of such defect." (Emphasis supplied.)

The appellant asserts that instruction number 4 is erroneous because the law does not require the plaintiff as an individual to prove anything. The appellant urges that the use of the phrase "*she* must prove by a preponderance of the evidence" misled the jury in so far as it instructed the jury to consider only the testimony of the plaintiff and precluded the consideration of the testimony of other witnesses produced by the plaintiff in support of her cause of action.

[1] It is apparent that the appellant has overlooked the court's preliminary instruction number 2 which defined the phrase "preponderance of the evidence" and informed the jury as to what evidence they might consider on any issue regardless of which party has the burden of proof as to said issue. Instruction number 2 clearly informed the jury that they must consider *all* of the evidence on any issue to determine whether it was established by a preponderance of the evidence and not merely the evidence of the party having the burden of proof. It is fundamental that when reviewing an instruction given by the trial court such instruction must be read in the light of all other instructions given by the court. McClure v. Miller (1951), 229 Ind. 422, 435, 98 N. E. 2d 498; Reichmann v. Reasner (1943), 221 Ind. 628, 634, 51 N. E. 2d 10.

[2] Where an instruction is given directing the jury to consider all the evidence as to any issue, a further instruction informing the jury that the plaintiff has the burden of proving the material allegations of the complaint is not confusing and does not mislead the jury. Shoemaker v. Ind. Railways & Light Co. (1922), 77 Ind. App. 261, 269, 270, 133 N. E. 591.

In the Shoemaker case this court considered an instruction which told the jury that—

> "If you find from the evidence in the case that the plaintiff has failed to prove the material allegations of his complaint the verdict should be for the defendant."

Other instructions told the jury that they should consider all the evidence on any issue. This Court held in that case that these instructions taken together could not have misled the jury.

[3] Instruction number 4 merely stated that the plaintiff must prove, by a preponderance of the evidence, the material allegations necessary to support a judgment for damages; and, therefore, it is our conclusion that instruction number 4 correctly charged the jury as to the facts which the appellant is required to prove, under Indiana authority, in order to recover damages for her alleged injuries. We find no reversible error in giving this instruction.

The appellant contends that the court erred in giving instruction number 5, which reads as follows:

> "The law recognizes the possibility of a *mere accident*, that is, an occurrence which is in no way due to the negligence of any one. Therefore, if you find from the evidence that the injuries complained of by the plaintiff in this case were the result of a *mere accident*, there can be no recovery by the plaintiff Anna Mary White." (Emphasis supplied.)

The appellant claims that by giving this instruction the trial court suggested to the jury that the proven facts sustained the theory that the plaintiff received her injuries as a result of a *mere accident*. This interpretation of the text of this instruction appears to be erroneous for, carried to its logical conclusion, it implies that any in-

struction given by the court suggests to the jury that the court believes that the facts should be found in a certain manner.

[4] Under a recent decision of the Supreme Court of Indiana a *mere accident instruction* is proper if there is evidence before the jury which would justify an unavoidable accident finding. Miller ux. v. Alvey (1965), Ind., 207 N. E. 2d 633. Clearly the record in the case at bar is replete with evidence that the chair in question collapsed through no fault of either party. The undisputed evidence establishes that the chair collapsed because the curl holding the rivet in the cross-brace of the chair's legs came off allowing the rivet to slip out of place. Both of the appellee's expert witnesses testified that in their opinion from an examination of similar rivets in chairs identical to the chair in question as well as the right rivet of the chair in question, the failure of the rivet was caused by an existing defect or crack on the underneath portion of the curl in part produced by the manufacturing process of stamping the rivet and heating the steel of the rivet, thereby causing a weaker coarse grain. Both expert witnesses testified that the defect could *not* be seen with the naked eye because it was underneath the curl and hidden in the channel of the chair.

[5] From an examination of the record there appears to be abundant evidence to support a finding that the curl failed because of a latent defect which would not have been discernible by any normal, reasonable visual examination of the chair or even a minute naked eye examination of the rivet and the curl. Consequently, accepting these opinions of qualified experts, as the jury must have, the failure of the rivet curl precipitating the collapse of the chair was not necessarily due to any negligent conduct on the part of either the appellee or the appellant but could have resulted from a *mere accident*. It is our opin-

ion that this evidence makes an instruction based upon *mere accident* proper; and at the very least, from this evidence the jury could properly infer that the appellant's injuries resulted from a *mere accident.*

[6] The assertion of the appellant that instruction number 5 confuses the jury because of another instruction which informed the jury that the appellant could not recover unless the jury found that appellee was guilty of negligence is certainly confusing in itself. The appellant has apparently overlooked the portion of instruction number 5 which informs the jury that in order to reach a verdict for the appellee on the basis of a *mere accident* they must find that the appellee was not negligent and that the collapse of the chair was not due to the negligence of the appellee.

There was no error in giving instruction number 5. Scott v. Sisco (1959), 129 Ind. App. 364, 371, 156 N. E. 2d 895.

The appellant next contends that the court erred in giving instruction number 6 which reads as follows:

> "The court instructs you that the mere fact that the plaintiff was injured carries with it no presumption of negligence on the part of the defendant. Negligence is an affirmative *fact* that must be established in this case by a preponderance of the evidence. It is not sufficient for the plaintiff to show that the defendant, Evansville American Legion Home Association, may have been guilty of the negligence charged. The evidence must point to the fact that it was so guilty, and where testimony leaves the question unanswered, and shows that one of several things may have brought about the injuries, for some of which the defendant may have been responsible, and for some of which it was not, it is not for you the jury to guess between these various causes and to find that the

negligence of the defendant, if any, was the *real cause,* if there is satisfactory foundation in the testimoney for the conclusion. In other words, you have no right to return a verdict upon mere conjecture, but a satisfactory foundation therefor must be found in the evidence, and if the evidence fails to furnish such foundation, there can be no recovery against the Evansville American Legion Home Association." (Emphasis supplied.)

[7] The appellant asserts that instruction number 6 was erroneously given basing her claim of error upon the principle of law announced by our Court in the case of Kempf v. Himsel, Administrator (1951), 121 Ind. App. 488, 98 N. E. 2d 200 and the similarity of an instruction considered therein with instruction number 6. The Kempf case can be readily distinguished from the case at bar in that the Kempf case involved injuries resulting from a known cause whereas the case at bar involved injuries suffered by the collapse of a folding chair, the cause of which was obscure. The question of the actual or real cause of the collapse of the chair was clearly in issue and dispute in the case at bar. The appellant charged in her complaint that the appellee was negligent in furnishing to the appellant a chair which it knew or should have known was defective; and that this was the proximate cause of the injury. In reply to appellant's contention the appellee contends that the chair's collapse was precipitated by a latent defect in the curl of the rivet which could not have been discovered by a most detailed inspection of the chair, and was only discernible by dissecting the rivet to expose the underneath portion of the curl. The appellee maintains that the collapse of the chair was caused by the instantaneous severance of the curl from the rivet because of a "coarse grain fatigue crack" which progressed in a circular manner around the unexposed side of the curl and underneath the baked-on enamel of

the rivet on a plane perpendicular to the axis of the rivet. The appellant, on the other hand asserts that the curl of the rivet gradually chipped away over a period of time and could have been discernible before the failure actually occurred. The jury was faced with the assertion of two different causes for the collapse of the chair including the responsibility or lack thereof. The jury was required to decide which of the two asserted causes was, in fact, the *real cause* of the collapse of the chair which resulted in appellant's injuries. There was, in fact, evidence produced at the trial on both possible causes and the jury had to consider and determine which causes resulted in the injury. We are convinced that the use of the phrase *real cause* placed upon the appellant only the burden of establishing by a preponderance of the evidence that the collapse of the chair was caused by a gradual chipping of the metal comprising the curl which could have readily been seen.

[8] The appellant next assails instruction number 6 for the reason that it ignores the question of negligence based upon an omission or failure to act. The courts in Indiana have uniformly held that negligence may be predicated upon a failure to act when there is a duty to act. Indiana Harbor Belt Railroad Company v. Jones (1942), 220 Ind. 139, 145, 41 N. E. 2d 361. However, appellant primarily asserts, as her specific charge of negligence, that the appellee affirmatively furnished appellant with a chair which it knew, or in the exercise of reasonable care should have known, was defective.

[9-11] Instruction number 6 states "* * * Negligence is an affirmative *fact* * * *." It does not use the word *act*. The Indiana courts have uniformly held that the duty of a jury, in a negligence case, constitutes finding as a *fact* whether or not the defendant was negligent as charged in the complaint. Union Traction Company of Indiana v.

Berry, Administrator (1919), 188 Ind. 514, 521, 121 N. E. 655 (reh. den. 124 N. E. 737, 32 A. L. R. 1171). The jury considering the negligence of the appellee is considering a question of *fact* as well as law. The Court in the Berry case held as follows:

> "In submitting the determination to a jury of a question of negligence, which is a *mixed question of law and fact,* the court is required to define the duty which the law imposes. * * * It is for the jury to consider the conditions and circumstances disclosed by the evidence in determining what action should have been taken or avoided, what precautions should have been employed, and what course of conduct should have been pursued in order to measure up to the duty of 'due care' which the law imposes. *In determining this fact* the jury applies the standard furnished by the court. * * *" (Emphasis supplied.)

In other words, the jury must find as a *fact* that the appellee was negligent as charged in order to support a verdict for the appellant, and that is precisely what instruction number 6 informed the jury.

We find no error in the submission of instruction number 6.

The appellant contends that the court erred in giving instruction number 7, as modified. The appellant specifically objects to the opening sentence of instruction number 7 which reads as follows:

> "I instruct you that the defendant, Evansville American Legion Home Association, was not an *insurer* of the plaintiff's safety while she was on its premises." (Emphasis supplied.)

The Supreme Court in this very case on a previous appeal said:

"The appellant (Evansville American Legion Home Association) *was not an insurer against injury.* F. W. Woolworth Co. v. Jones, 1955, 126 Ind. App. 118, 130 N. E. 2d 672; Hook v. National Brick Co., 7 Cir., 1945, 150 F. 2d 184." (Emphasis supplied.) Evansville American Legion Home Association v. White (1959), 239 Ind. 138, 154 N. E. 2d 109, 111.

[12] In examining the entire content of instruction number 7, it is apparent that the jury was correctly advised as to the duty of care required of the appellee to the appellant. It is difficult to understand how this instruction on the duty of care which the appellee owed to the appellant could have possibly suggested that the appellee itself was "uninsured". The instruction says nothing about the question of appellee's insurance coverage and doesn't even use the word "insurance"; it merely states that the appellee is not an *insurer* of plaintiff's safety, by way of defining the appellee's duty of care. The appellant evidently is of the opinion that the jurors did not understand the meaning of the word *insurer* but that the very use of any form of the word "insurance" conjured up in the jury's mind the absence of an insurance company standing behind the appellee. It is apparent to this court that the apellant's interpretation of the word *insurer* is merely a distortion of the use of the word.

[13] In addition to the above contention, the appellant further contends that instruction number 7 is mandatory in nature. The instruction as given to the jury concluded with the phrase "then the plaintiff cannot recover in this action." It is clear that the use of this particular language in the instruction merely defines the duty of care which the appellee owed to the appellant and is in no sense mandatory since it makes no attempt to positively direct the jury to find for one party and against the other party. Vance v. Wells (1959), 129 Ind. App. 659, 159 N. E. 2d 586.

[14] The appellant also urges that instruction number 7 contains an erroneous definition of the duty owed to the appellant by the appellee. From an examination of Indiana authorities it appears that this instruction number 7 properly states the duty of care which the appellee owes to the appellant, i. e., to exercise reasonable care to keep its facilities in a reasonably safe condition. Robertson Brothers Department Store, Inc. v. Stanley (1950), 228 Ind. 372, 90 N. E. 2d 809; F. W. Woolworth Co. v. Jones (1955), 126 Ind. App. 118, 121, 130 N. E. 2d 672; Standard Oil Co. of Indiana, Inc. v. Scoville (1961), 132 Ind. App. 521, 175 N. E. 2d 711.

If the jury found that the appellee fulfilled that duty of care, as they must have found, then there would be no negligence on the part of the appellee upon which liability could be based. There is no independent duty to make an inspection upon which negligence can be based. See, Evansville American Legion Home Association v. White, supra.

A verdict in favor of appellee based on instruction number 7 presupposes that the premises were in a reasonably safe condition and therefore the question of inspection would be irrelevant.

Clearly there was no error in giving instruction number 7, as modified.

The appellant contends that the court erred in giving instruction number 9, which reads as follows:

> "I instruct that if you find by a preponderance of the evidence that the defendant, Evansville American Legion Home Association, *was not negligent as charged,* or if it was, that such negligence was not the proximate cause of the injuries and damages complained of, or if you find that the plaintiff herself was *guilty of negligence that proximately contributed to the injuries and damages complained of,* then the

plaintiff, Anna Mary White, cannot recover in this action and it would be your duty to return a verdict for the defendant Evansville American Legion Home Association." (Emphasis supplied.)

The appellant specifically asserts that the giving of instruction number 9 was erroneous because it informed the jury that the *negligence of the appellee could only be predicated upon the specific acts of negligence as charged in appellant's complaint.* It appears to us that this proposition of the appellant is contrary to the weight of authority in Indiana for our courts have uniformly held that when acts of negligence are charged in the complaint, the plaintiff can recover only upon proof of the specific acts charged or not at all. Wylie v. Meyers (1958), 238 Ind. 385, 391, 150 N. E. 2d 887; Indianapolis and Cincinnati Traction Company v. Sherry (1917), 65 Ind. App. 1, 4, 116 N. E. 594.

Both of the cases which the appellant cites in her brief in support of her proposition, namely, that the plaintiff may recover on acts of negligence not alleged in the complaint, appear not to be cases comparable in their factual situation to the case at bar and do not support the appellant's contention. It has been uniformly held by Indiana courts that in actions based on negligence the plaintiff must prove at least one of the alleged acts of negligence in order to recover.

[15] Further, from an examination of the record evidence, there appears to be no evidence submitted that would support any other acts of negligence than those alleged in the complaint and therefore the appellant could not be prejudiced by the giving of instruction number 9.

The appellant finally contends that instruction number 9 erroneously instructed the jury on the issue of contributory negligence.

[16] However, the appellant has waived any error in giving this instruction on the issue of contributory negligence for the appellant in her tendered instruction number 7, which was given by the court, as modified, requested the court to instruct and the court did instruct the jury as follows:

> "* * * If you find from a fair preponderance of the evidence that the defendant * * * was guilty of any one or more of said acts of negligence * * * and that said one act or more of negligence was the sole proximate cause of the accident in question * * * *and without any contributory negligence* then under such circumstances your verdict may be for the plaintiff, Anna Mary White, and against the defendant * * *" (Emphasis supplied).

The submission of this instruction number 7 by the appellant raised the issue of contributory negligence and therefore the appellant invited the issue of contributory negligence by tendering her own instruction on said issue and she cannot now complain that it was erroneous. Coca Cola Bottling Works of Evansville, Inc. v. Williams (1942), 111 Ind. App. 502, 514, 37 N. E. 2d 702; Riechmann v. Reasner (1943), 221 Ind. 628, 51 N. E. 2d 10, 13.

There appears to be no error in the giving of instruction number 9.

The appellant next urges that the giving of instruction number 14 was erroneous. Instruction number 14 reads as follows:

> "If you find from a preponderance of the evidence that the cause of the collapse of the chair in question was the parting or breaking off of the curl of the rivet holding the right hand legs of the chair, and that it is equally as probable for such parting or breaking to have occurred at the time when the plaintiff pulled the chair out and attempted to seat herself

thereon as at a time prior thereto, then the jury cannot speculate as to when that event occurred and the verdict should be for the defendant."

Specifically the appellant maintains the following. That the giving of this instruction was erroneous because the instruction improperly bases and limits liability solely to the time of the breaking of the curl of the rivet, and informs the jury that if such breaking occurred at the time plaintiff attempted to seat herself upon the chair she could not recover and in which event the verdict of the jury should be for the defendant. That the instruction is mandatory in nature and requires the jury to return a verdict for the defendant should they find that the breaking of the curl of the rivet occurred at the time the plaintiff attempted to sit upon the chair, regardless of any acts of negligence that the defendant might have been guilty of prior to the time of the breaking of the rivet. That this instruction told the jury that if they couldn't agree on that particular aspect of negligence then they are required to find for the defendant, even though they could have easily found that the defendant was guilty of many different acts of negligence regarding the chair prior to the time of the breaking of the rivet. In other words, it is the contention of the appellant that by giving this instruction the jury was prohibited from considering the defendant's negligence in failing to properly repair the chair, and in failing to discard this particular chair as well as others of the same batch which the defendant knew had frequently been breaking for some period of time. That by giving this alleged mandatory instruction all of these issues which comprise the greater part of plaintiff's complaint were taken from the jury.

[17] Appellant bases her specific objection to the giving of instruction number 14 on the proposition that appellee might have been negligent in some manner by failing to inspect or repair the chair in question. However, it is the

law of this jurisdiction that an inviter has no "independent duty to inspect" upon which negligence can be based. See, Evansville American Legion Home Association v. White, supra. The Supreme Court in this opinion cited the case of Hook v. National Brick Co., supra, to support the proposition that there is no independent duty to inspect upon which negligence can be based.

In the Hook case the Circuit Court of Appeals stated at page 187 of 150 F. 2d the following:

> "No Indiana case has been cited and we are unable to find one which has announced the rule applicable to such a situation. In Restatement of the Law, Vol. Torts, Chap. 12, Par. 300, it is stated: 'A failure to make an inspection does not create liability unless the inspection, if made, would have disclosed the particular defect which makes the use harmful to the other. * * * It is sometimes true that those who use certain instrumentalities are under a duty to make reasonable inspection thereof. The duty of inspection is not, however, ordinarily an independent duty upon which liability is based, but is a duty, the performance of which is a condition precedent to a reasonable use of the instrumentality. The actor's negligence lies in his act of using the defective instrument without adequate inspection, not in his omission to perform his duty of inspection.'" (There follows in the opinion the citation of a number of cases in support of this principle.)

Appellant alleged specific acts of negligence predicated upon the proposition that a reasonable inspection would have disclosed the imperfection of the chair and therefore the appellee was negligent in furnishing the appellant the defective chair, in failing to repair the chair, in failing to test or inspect the chair, and in failing to warn the appellant of the defective and unsafe condition of the chair, all of which are based upon the hypothesis that the curl

had come off the rivet before the appellant attempted to use the chair.

[18] From an examination of the language used in instruction 14 it appears to be merely definitive of the burden of proof required on the central issue of fact in this case, i. e., the time that the chair became defective. Before a duty to do, or refrain from doing any of the acts of negligence charged in appellant's complaint arose, the appellant, having the burden of proof, must establish as a foundation for each charge of negligence that the chair was in a defective condition before the appellee could have been found to know of such defective condition or in the exercise of reasonable care should have known of such condition. From a consideration of the evidence most favorable to the appellee, its expert witnesses, Mr. SerVass and Mr. Harris, stated that in their opinion the curl broke off in one *piece* because of a circular crack moving perpendicular to the axis of the rivet underneath the curl which would not have been visible to the naked eye. Therefore, if the jury found that the curl did not break until the appellant pulled out the chair, or attempted to sit upon it, the appellee could not have known of its defective condition because an inspection would not have revealed the latent crack, or if the jury found that it was equally as probable that the curl did not break until the appellant attempted to use it, then there was no preponderance of evidence on the primary fact upon which each charge of negligence was based before the appellant is entitled to recover. This is precisely what appellee's instruction number 14 informed the jury. It is our opinion that this instruction did not incorrectly eliminate the jury's consideration of the appellant's basis of negligence, for unless the jury found the facts, as set forth in instruction number 14, in favor of the appellant there would be no basis for finding that the appellee was negligent as charged by the appellant. In-

struction number 14 tells the jury only if they find that the curl broke off *at the time* appellant attempted to sit upon the chair and that this parting or breaking of the curl caused the chair to collapse, then the verdict should be for the defendant. If the jury so found, obviously there was no prior defect of which the appellee could have had knowledge. We feel that instruction number 14 correctly stated the law relative to issues in this case and that there was no error in giving this instruction.

The appellant urges that the court erred in giving instruction number 15, which reads as follows:

> "If you find by a preponderance of the evidence that the defendant did not create the alleged defect in the chair in question and that it did not know of such defect and which defect it could not have discovered by reasonable inspection, then I instruct you that the plaintiff cannot recover in this action and it will be your duty to return a verdict for the defendant Evansville American Legion Home Association."

[19, 20] The appellant specifically contends that instruction number 15 eliminated the consideration of any evidence on the question of knowledge. This contention appears to be untenable for the reason that the instruction allowed the jury to consider the evidence that other chairs were found to be defective and discarded by the appellee. Appellee's only duty to the appellant was to keep its chairs in a reasonably safe condition. Huttinger v. G. C. Murphy Company (1961), 131 Ind. App. 642, 647, 172 N. E. 2d 74.

[21] This instruction properly defined that duty under the holding in Evansville American Legion Home Association v. White, supra, namely, that appellee was not guilty of a breach of this duty unless there was some showing that appellee had knowledge of the defect. It seems apparent that appellant's assertion that appellee had a duty

to discard this chair and all others regardless of whether it had knowledge of the defect, or could have discovered the same by a reasonable inspection, contravenes this decision of the Supreme Court.

It seems quite obvious that instruction number 15 properly applied the law to the facts in issue and was not erroneous.

The appellant next contends that the giving of instruction number 30 was erroneous. Instruction number 30 reads as follows:

> "I instruct you that the mere fact that an accident occurred while the plaintiff was on the defendant's premises is not proof that the defendant was in any way negligent or guilty of maintaining a nuisance as charged in Paragraph Two of plaintiff's amended complaint."

The specific objection of the appellant is that the instruction injected the question of "nuisance" in the issues of this case.

[22, 23] Instruction number 30 did not attempt to instruct the jury relative to the law of nuisance as asserted by the appellant but only mentioned "maintaining a nuisance" in reference to the allegations contained in Paragraph Two of the plaintiff's amended complaint. Rhetorical Paragraph III of Paragraph Two of the complaint reads in part as follows:

> "That at the time the plaintiff attempted to seat herself upon the said chair, as aforesaid, the same was and had been for a long time prior thereto, in a defective and unsafe condition to be used to sit upon. * * *"

While the complaint does not further develop the theory of nuisance, these allegations set forth a situation which

could be construed as "injurious to health so as essentially to interfere with the comfortable enjoyment of life. * * *" See, Burns Indiana Statutes, § 2-505, 1946 Replacement. The complaint was submitted to the jury by the court in its preliminary instruction number 1. Accordingly, the inference of nuisance was introduced to the jury through instruction number 1, and instruction number 30 did no more than inform the jury that the mere fact that the appellant was injured on the premises of the appellee did not establish negligence which was specifically pleaded or any inference of nuisance which the jury might have drawn from Rhetorical Paragraph VI of Paragraph Two of appellant's complaint. There appears to be no question but that this instruction properly states the law of this state on this issue. Unless the doctrine of res ipsa loquitur is applicable, the mere fact that an injury occurred does not in and of itself establish negligence on the part of the defendant. Southern Indiana Railway Company v. Messick (1905), 35 Ind. App. 676, 74 N. E. 1097. It appears to us from an examination of the entire content of the instruction that this instruction was merely explanatory and properly informed the jury that they could not base a finding of negligence merely upon the fact that the appellant was injured while on the property of the appellee. The phrase "guilty of maintaining a nuisance" could not have been prejudicial to the appellant for there was no attempt to define a nuisance or set forth the essential elements which the appellant would have to prove to support a recovery under this theory. No other instruction mentions nuisance for the obvious reason that the appellant did not pursue the theory beyond the language in her complaint. Instruction number 30 in no sense required the jury to consider the question of nuisance in arriving at their verdict. Simply informing the jury that the happening of the accident did not prove negligence or the maintenance of a nuisance on the part of the appellee was in no manner prejudicial to the ap-

pellant and accordingly the giving of instruction number 30 was not erroneous.

The appellant contends that the giving of instructions number 32 and 33 was erroneous.

Instruction number 32 reads as follows:

> "I instruct you that contributory negligence is generally taken to mean negligence on the part of the plaintiff which proximately contributed to the accident or injuries complained of.
>
> "As applied to this case insofar as the cause of action set forth in Paragraph Two of plaintiff's amended complaint is concerned, contributory negligence would be taken to mean negligence on the part of the plaintiff Anna Mary White."

Instruction number 33 reads as follows:

> "To establish the defense of contributory negligence it is not necessary to show that the plaintiff's negligence, if any, was the sole proximate cause of the injury, but only that it was a concurring or co-operating proximate cause."

[24] The appellant raises the same objection to the giving of instructions number 32 and number 33 as she raised to the giving of instruction number 9, namely, that it was error to instruct the jury on the issue of contributory negligence. This contention of the appellant has been considered heretofore in this opinion and it would be of no benefit to repeat this discussion. However, by the way of summary it appears to this court that there certainly was some evidence of contributory negligence injected into this record by the appellant's own testimony as to her prior knowledge of the collapse of other chairs in appellee's amusement hall. If appellant's knowledge of the danger equaled the knowledge of the appellee, no liability could be predicated against the appellee. Hedgecock v. Orlosky (1942), 220 Ind. 390, 395, 44 N. E. 2d 93.

[25] Appellant further objects to the giving of instruction number 32 for the reason that the instruction in some manner told the jury that the plaintiff was, in fact, contributorily negligent. This objection to the giving of instruction number 32 is raised for the first time on this appeal. The appellant did not present this objection to the trial court at the time the instructions were being considered by said court. Where a specific objection to an instruction is not presented to the court below, it is not available on appeal. Supreme Court Rule 1-7; Hancock Truck Lines, Inc. v. Butcher (1950), 229 Ind. 36, 43, 94 N. E. 2d 537; Riechmann v. Reasner, supra; Lively, Administratrix v. Hanagan Brothers, Incorporated (1950), 120 Ind. App. 503, 506, 92 N. E. 2d 223 (reh. den. 93 N. E. 2d 202).

[26] From an examination of instruction number 32 it appears to be nothing more than a general definition of contributory negligence, which is then applied to the case at bar; and that appellant's assertion that the instruction informs the jury that the appellant was negligent appears to be a blatant misreading of the instruction. Instructions number 32 and 33 properly define the legal doctrine of contributory negligence and properly applied it to the case at bar. Huey v. Milligan (1961), 242 Ind. 93, 175 N. E. 2d 698.

For the reasons set out herein, we find that in the giving of instructions number 32 and 33 the trial court committed no reversible error.

The appellant next complains that the court erred in giving instruction number 35, as modified. This instruction reads as follows:

> "You are instructed that Anna Mary White is the only plaintiff and Evansville American Legion Home Association is the only defendant in this case, and

that there is no evidence in this case that there is any other party, plaintiff or defendant, interested in its outcome."

The appellant complains that the instruction is erroneous because by inference it contains a suggestion of "insurance"; and that she was harmed because the jury must have decided that the appellee was not protected by insurance.

From an examination of the instruction, it appears that the facts stated therein are absolutely true. The record clearly discloses that "Anna Mary White is the only plaintiff and Evansville American Legion Home Association is the only defendant in this case." This instruction merely told the jury what the law presumes they believed all along. That this instruction could raise any inference as to insurance seems untenable. No where is the word, any form of the word, or any synonym of the word "insurance" used in the instruction.

Having created her mystical inference from the language used in instruction number 35, the appellant then cites two cases from foreign jurisdictions to support her inference. The appellant sets forth a quotation from the West Virginia case of Graham v. Wriston (1961), 146 W. Va. 484, 120 S. E. 2d 713, to the effect that the jury should not be apprised that the defendant is not insured but fails to point out that the court was not referring to any instruction given but rather was referring to argument made by defendant's counsel to the jury following a witness' mention of the defendant's insurance company. The court based its reasoning upon the rule that the jury should decide the case without reference to whether or not the defendant is covered by liability insurance.

The appellant next quotes from the case of Brooks v. Menaugh (Mo. 1925), 284 S. W. 803, 805, wherein the

court says that an instruction telling the jury that there was no evidence that an insurance company was interested in this case was improper. But in the next sentence of the opinion the court states that under some circumstances even this instruction might be harmless. It is difficult for this Court to see how appellant's citation of foreign authority will implant the subject of insurance in instruction number 35 when there is absolutely no reference made to insurance in the instruction. *Neither does the record in the case at bar disclose any evidence, remarks of counsel or statements in the pleadings which might make the jury aware of the presence or absence of insurance.* On the contrary, instruction number 35 must have forced the jury to decide the case upon the merits without reference to any extraneous matter because it told the jury that "Anna Mary White is the only plaintiff and Evansville American Legion Home Association is the only defendant." The instruction merely stated as a matter of record that the appellant and appellee named herein are parties to the controversy.

[27] At the most instruction number 35 might be considered superfluous but certainly, if considered erroneous for that reason, the giving of the instruction would be harmless.

The court can find no reversible error in giving instruction number 35.

The appellant next urges that the court erred in giving instruction number 41, which reads as follows:

> "The fact that the Court has instructed you with reference to the major damages in this case and as to what you have the right and as to what you have not the right to take into consideration in determining the damages in case you find for the plaintiff, must not be taken by you as any indication that the Court

believes that you should find either for or against the plaintiff. The Court has given you those instructions on the measure of damages only to guide you in case you do find for the plaintiff and the giving of those instructions must not be considered by you as any indication as to what the Court thinks you should find by your verdict."

[28] The appellant has implicitly waived any alleged objection to this instruction by her failure to set forth any citation of authority. Supreme Court Rule 2-17; Keck v. Pozorski (Ind. App. 1963), 191 N. E. 2d 325, 331.

However, we will attempt to answer appellant's objection. The appellant specifically complains that a portion of the instruction was prejudicial to her but she fails to show in what manner. Simply asserting that the instruction is prejudicial does not make it so. It appears to this court that quite obviously this instruction was intended to and did simply express to the jury the court's neutrality with respect to the questions which the jury must decide.

The same proposition in an instruction on damages has been approved by our court in the following case. Louisville and Southern Indiana Traction Company v. Miller (1924), 82 Ind. App. 344, 352, 142 N. E. 410.

[29] The instruction on the issue of damages in the Miller case concluded with the following pronouncement:

"The Court must not be understood as intimating in the least degree whether or not you should assess any damages."

This Court held that the language used in this instruction was proper. It is our opinion that appellant's objection to the giving of instruction number 41 is not meritorious; and that the court did not err in submitting it to the jury.

The appellant next complains that the court erred in giving instruction number 43, which instruction reads as follows:

> "The verdict of the jury should be deliberate conclusion of the mind of each and every individual juror. You may, and should discuss the case together and exchange individual views and reasons together, but before you agree upon a verdict each member of the jury must make up his own mind, without being controlled in your verdict by the other members of the jury. In other words, when men are jurors they sit and act as individuals, so far as the ultimate decision of each is concerned, and each juror, in arriving at, and agreeing to a verdict, should be governed by his own individual mind and conscience and not by the minds and consciences of his fellow jurors."

[30] Appellant's specific objection to this instruction is that the trial court suggested to the jury a "mis-trial" or "hung jury". It has long been recognized in Indiana that each juror in reaching his decision must exercise his individual judgment so that the verdict reached will be that which is approved by his conscience. Richardson v. Coleman (1891), 131 Ind. 210, 212, 29 N. E. 909.

In the Richardson case the court held as follows:

> "• • • In arriving at a verdict a juror should not indulge in any undue pride of personal opinion, and he should not be unreasonable or obstinate, and he should give due consideration to the views and opinions of other jurors, and listen to their arguments with a willingness to be convinced and to yield to their views if induced to believe they are correct. But the law does not expect, nor does it tolerate, the agreement by a juror upon a verdict, unless he is convinced that it is right; *in other words, unless it is his verdict, a verdict which his conscience approves,*

and he, under his oath, after a full consideration, believes to be right * * *" (Emphasis supplied).

[31] From an examination of the instruction we feel that the jury was properly instructed concerning the basis of their verdict. This instruction told the jury succinctly that they should discuss the case together and exchange individual views, but each juror should base his decision upon his own mind. Each juror's ultimate decision as to the verdict should be governed by his own mind and conscience and not simply upon the opinions of his fellow jurors. This instruction cautions the jurors only that their concurrences in the verdict must be governed by their own judgment and conscience *after a thorough discussion.*

Unquestionably this instruction embodied the principles of law set forth by our Supreme Court in the Richardson case and is in no manner erroneous.

Appellant assails instruction number 44 as an incorrect statement of the law because it did not incorporate the phrase "under the same or similar circumstances." Instruction number 44 reads as follows:

> "One who operates a place of public entertainment is required to use reasonable care in maintaining its facilities in a reasonably safe condition the same as any other person who expressly or impliedly invites another to come upon his premises."

As it appears to the court instruction number 44 attempts to merely define the *duty* of care owed to the appellant by the appellee. The appellant upon entering the appellee's amusement hall occupied the status of an invitee and was owed the *same duty* as any invitee who goes upon the premises of another and that is to maintain the premises in a reasonably safe condition. Standard Oil Company of Indiana, Inc. v. Scoville (1961), 132 Ind. App. 521, 175 N. E. 2d 711; Cleveland, Cincinnati, Chicago and

St. Louis Railway Company v. Means (1915), 59 Ind. App. 383, 391, 104 N. E. 785, 108 N. E. 375.

[32] Our courts have uniformly held that when the relationship of invitee and occupant is established, the duty arises and *remains constant* whether the premises is a business, private club or home for our courts do not recognize "degrees" of duty. Union Traction Company of Indiana v. Berry, Admr. (1919), 188 Ind. 514, 520, 521, 121 N. E. 655 (reh. den. 124 N. E. 737, 32 A. L. R. 1171); Rush v. Hunziker (1940), 216 Ind. 529, 533, 24 N. E. 2d 931. The purpose of instruction number 44, as it appears to us, was only to define the duty of care placed upon the defendant by law. The duty is the same as the duty owed by any other owner or occupant of a premises to a licensee by invitation. The defendant had no more duty than the owner or occupier of any other premises toward invitees. It appears, however, that the appellant by her objection to this instruction has confused the *duty of care* owed with the formula for the *quantum of care* which will fulfill that duty. Union Traction Company of Indiana v. Berry, Admr., supra.

From the language in this opinion the court clearly differentiates the *duty* of care from the *standard* of that care. At page 521 of the above opinion, 121 N. E. at page 657 is found the following statement:

> "• • • The duty is the same under all relations, and the standard of care which will measure up to the duty in all cases is such care as a person of reasonable or ordinary prudence would exercise in view of all the conditions and circumstances as disclosed by the evidence in the particular case. • • •"

[33] Because instruction number 44 merely defines the *duty of care* owed to the plaintiff, *not* the *standard of care* which would measure up to that duty, the use of the phrase

"under the same or similar circumstances," which is definitive of *quantum of care,* would have been improperly inserted in that instruction.

Accordingly instruction number 44 properly defined the duty of care owed to the appellant and the trial court committed no error in giving it to the jury.

[34] Appellant contends that instruction number 45 should not have been given because it was repetitious and she asserts that it repeated the errors committed in instructions number 15, 18 and 19. From an examination of the record it appears that no argument in her brief has been made by the appellant with respect to the giving of instructions number 18 and 19, and furthermore the appellant cites no authority to support her claim of error. As has been previously stated in this opinion, it has been very clearly decided by the courts of this state that on appeal, where an objection urged on appeal was not presented to the court below, any such alleged error is waived by failure to set forth authority in support of that contention. Peckham v. Smith, a Minor (1960), 130 Ind. App. 452, 461, 165 N. E. 2d 609.

The objection to instruction number 15 has been discussed elsewhere in this opinion and the court held that there was no error in giving instruction number 15.

The appellant objects to the giving of instructions numbers 38, 39 and 40 for the reason that they are repetitious and negative in nature. The appellant does not attack the instructions for stating incorrect principles of law or for not being within the issues, but attacks them simply on the basis that the appellee has tendered too many instructions; and that some of said instructions are mandatory in nature.

[35] It has been uniformly held by our courts that if instructions are proper under the evidence and correctly

state the law, it is to be presumed that the jury fulfilled its duty by following the court's instructions in applying the instructions to the evidence in reaching its verdict. In M. O'Connor & Company v. Gillaspy (1908), 170 Ind. 428, 435, 83 N. E. 738, 741, the Supreme Court of Indiana considered an assertion of error based upon an intimation by counsel that some one other than the defendant might be interested in the defense of the case. Commenting on the admonition of the trial court to the jury to disregard the remark, the Supreme Court said,

> "* * * The obligation of the jurors binds them to accept the law and the evidence as their only guides in arriving at a verdict, and we must assume that they will treat all litigants with fairness and impartiality. We are not warranted in presuming that they disregarded their oaths. * * *"

[36] However, it appears that the appellant in objecting to the giving of instructions 38, 39 and 40 assumes and asserts that the jury did not perform its duty in accepting these instructions but listened to and accepted only those portions of the instructions which told the jury that the *appellant could not recover*. Appellant has taken each such quoted phrase from the context of each instruction, of which it was only a part, overlooking the substantive portion of each instruction which applied a principle of law to the facts. Not only is it improper to assume, without any proof whatsoever, that all twelve members of the jury would deliberately and intentionally ignore their duty, but such an assumption seems to be not in any way supported by the record in this case.

Appellant predicates her specific assertion of error upon repetitions contained in the instructions. However, in Indiana, repetitive instructions do not normally constitute reversible error and have almost never been the basis

for reversing the judgment of a trial court. Rader v. Collins (1960), 130 Ind. App. 227, 238, 161 N. E. 2d 381; Davis, Executor v. Babb (1921), 190 Ind. 173, 188, 125 N. E. 403; Robbins, Executor v. Fugit (1920), 189 Ind. 165, 168, 126 N. E. 321. In the Davis case the Supreme Court of Indiana held that repetition of a correct principle of law in a civil case is harmless. Nor is it error to give several instructions on the facts and circumstances which the jury may consider in assessing damages. See, Gulley v. Hamm (1947), 117 Ind. App. 593, 596, 73 N. E. 2d 188. It appears to be proper in our state for the court to repeat the ad damnum clause of the plaintiff's complaint in several instructions. Southern Indiana Gas and Electric Company and Price v. Bone (1962), Ind. App., 180 N. E. 2d 375.

[37] The trial court in the case at bar gave forty-five instructions. Some of them repetitious and twenty-one of the instructions, according to the opinion of the appellant, are mandatory in nature. It appears to this Court that these instructions could and probably should have been consolidated into a smaller number of instructions; and that the jury could have been properly instructed on all phases of the law in this case by giving a fewer number of instructions. However, there is no numerical limitation, in this state, upon the number of instructions which may be given by the court. The number of instructions to be given is left to the province of the trial court and although the courts of appeal of this state have many times been critical of the number of instructions given, the number of instructions given has never alone been a sufficient reason to reverse the judgment of the trial court. Pfisterer v. Key (1941), 218 Ind. 521, 33 N. E. 2d 330. In the Pfisterer case the trial court gave sixty instructions and submitted ninety-three interrogatories to the jury. Although our Supreme Court stated that too many in-

structions were given, the court held that this question was within the province of the trial court.

[38, 39] It appears that there is no authority in Indiana, nor is there any justifiable reason, for reversing a judgment solely on the number of instructions given.

The next error complained of by the appellant was the refusal of the court to give appellant's tendered instruction number 5. This instruction tendered by the appellant reads as follows:

> "The Court instructs the jury that if you find from a fair preponderance of the evidence that at the time the chair which has been identified as plaintiff's Exhibit No. 1 was set up to the table for the Bingo in question and at the time the plaintiff, Anna Mary White, attempted to use said chair and that the defendant corporation, Evansville American Legion Home Association, was the owner of and had the management, control and possession of same, and if you further find that said chair was defective and unsuitable to be used to sit upon at all of said times, *then under such circumstances the Court charges you that there is no obligation or requirement that the plaintiff, Anna Mary White, has to show that said corporation, Evansville American Legion Home Association, actually knew or had knowledge that said chair was defective and unsuitable to be used to sit upon*" (Emphasis supplied).

This instruction is based upon the doctrine of *res ipsa loquitur*. The non-applicability of the doctrine of res ipsa loquitur to the facts in this case was settled adversely to the appellant's contention in a prior appeal of this case in the case of Evansville American Legion Home Association v. White, supra. The court in substance said in its opinion that the appellant had the burden of showing that

the appellee had knowledge, either actual or constructive, of any defect in the chair that caused the appellant's injuries. At page 141 of this opinion, 154 N. E. 2d at page 111, appears the following:

> "* * * There is no showing of actual or constructive knowledge on the part of the appellant which would create a duty to make an inspection of the minute character that would have been required here to find the flaw which apparently was latent. The appellant was not an insurer against injury. * * *
>
> "'A man cannot be held responsible on the theory of negligence for an injury from an act of omission on his part unless it appears that he had knowledge or reasonably was charged with knowledge that the act or omission involved danger to another.' 38 Am. Jur., Negligence, Sec. 23, p. 665."

[40] Based upon this decision of the Supreme Court, appellant's instruction number 5 would appear to be erroneous because the Court held that the evidence must show that the *appellee had knowledge, either actual or constructive, of the latent defect in the chair.* Accordingly it is our opinion that the trial court did not err in refusing to give appellant's instruction number 5.

The appellant further contends that the court erred in refusing to give instruction number 6 tendered by the appellant. Instruction number 6 reads as follows:

> "The Court instructs the jury that the defendant, Evansville American Legion Home Association, is a corporation, duly organized and existing by virtue of the laws of the State of Indiana, and the fact that its name contains the words "American Legion" gives it no additional or special rights or privileges and should be treated by you as any other corporation in determining the question of not only its liability, if

any, to the plaintiff, Anna Mary White, but also the question of her damages, if any."

[41] From an examination of the appellant's brief it is apparent that the appellant has again cited no authority for her assertion of error in the refusal of the court to give to the jury appellant's tendered instruction number 6. As stated before by the failure to cite authority, the appellant waives any consideration of this error.

[42] Neither does the appellant present any reason why the trial court should have singled out the appellee and discussed its status with the jury except that the appellant tendered only eight instructions. The number of instructions tendered by the appellant provides no justification for the court's assurance to the jury that the appellee was susceptible to a judgment. This fact was self evident for the reason that the appellee was present in court as a defendant.

For these reasons we feel that the trial court did not err in refusing to give appellant's tendered instruction number 6.

The appellant claims that the trial court erred in admitting into evidence appellee's Exhibit 3. Exhibit 3 appears to be a brochure given to Gerald Fuchs, a witness for the plaintiff, by the wholesaler at the time the witness purchased two folding chairs as exemplified in appellant's Exhibits 4 and 5. The specific objection of the appellant is that a private publication is not admissible to prove the facts contained therein; and that therefore the brochure constituted hearsay evidence. In answer to this objection, appellee contends that the brochure was not put in evidence to prove the facts stated therein but was used simply to demonstrate the basis of the witness' knowledge concerning his testimony given on direct ex-

amination; and that this Exhibit 3 having been offered in evidence for this purpose, the brochure was not subject to the hearsay rule.

[43] Hearsay evidence is defined as testimony of a witness relative to declarations of another *offered for the purpose of proving the facts asserted by the declarant.* Wayne Works v. Hicks Body Company, Inc. (1944), 115 Ind. App. 10, 21, 55 N. E. 2d 382; Griffith, Executor v. Thrall, Administrator (1941), 109 Ind. App. 141, 156, 29 N. E. 2d 345.

When statements of third persons or writings of others are not offered for the proof of the matter asserted therein, such evidence does not violate the hearsay rule. In the case of Durham Manufacturing Company v. Hutchins (1945), 115 Ind. App. 479, 483, 58 N. E. 2d 444, testimony of a physician as to statements made by a person seeking medical treatment was held to be properly admitted into evidence not to demonstrate the truth of the statements, but to show the basis of the doctor's opinion.

[44] The brochure comprising appellee's Exhibit 3 was properly admitted to show the basis of the witness' knowledge of the facts about which he was testifying when it was established that his knowledge was based upon information given to him by the wholesaler, of which this brochure was a part. Accordingly we hold there was no error in admitting appellee's Exhibit 3 for that purpose.

[45] It is our opinion and judgment that the verdict and judgment rendered in the court below was amply and sufficiently sustained by the evidence and was not contrary to law; and for reasons set out herein the appellant has wholly failed to demonstrate any reversible error.

In view of our holding that the appellant has wholly failed to demonstrate any reversible error, it appears not

to be necessary for a final determination of this appeal to consider the errors set forth by the appellee (cross-appellant) in its cross-appeal.

However, this court is of the opinion that we should give consideration to the cross-errors and state our opinion thereon which we feel will obviate the necessity of further consideration of errors alleged by cross-appellant in its cross-appeal.

Cross-appellant assigns as cross-errors that the trial court erred in overruling the defendant's written objections to further proceedings and submission of plaintiff's paragraph two of her complaint to the jury; that the trial court erred in giving to the jury its preliminary instruction number 1 over the objection of the defendant; that the trial court erred in overruling defendant's motion for a directed verdict at the conclusion of the evidence in chief for the plaintiff; that the trial court erred in refusing to give to the jury defendant's tendered peremptory instruction number B at the conclusion of all of the evidence; and that the trial court erred in refusing to give to the jury defendant's tendered instructions number C, D, E, F, G, H, I and J, which instructions were tendered and requested by the defendant.

The principal question presented by the cross-appeal is whether or not, after an adverse final judgment rendered against the cross-appellee on the merits of the amended complaint, as amended by interlineation (paragraph one), the cross-appellee is entitled to retry the *same* cause of action a second time under a second paragraph of complaint without taking any steps to set aside the adverse judgment on the first paragraph of the complaint.

The specific contentions of the cross-appellant are as follows. The cross-appellant urges that the record clearly demonstrates that the cross-appellee, in her amended

complaint, as amended by interlineation (paragraph one), for personal injuries allegedly sustained as a result of a collapsed steel chair on the premises of the cross-appellant, was based on the theory of general negligence pursuant to the doctrine of *res ipsa loquitur*. The first trial resulted in a verdict and a judgment for the cross-appellee. From this judgment an appeal was taken to this Court and later the appeal was transferred to the Supreme Court, which court in its opinion reversed the judgment of the trial court and ordered the court to grant a new trial. The Supreme Court in disposing of this appeal, in the case of Evansville American Legion Home Association v. White, supra, held in substance that the issues of the amended complaint, as amended by interlineation (paragraph one), proceeded on the doctrine of *res ipsa loquitur*, and that the facts alleged and proved did not bring the case under the doctrine of *res ipsa loquitur*.

Cross-appellee on the second trial of this cause filed a second paragraph of complaint, identical with the amended complaint, as amended by interlineation (paragraph one), with the exception that in the second paragraph cross-appellee alleged four specific acts of negligence. At the time the cross-appellee moved to file an additional paragraph of complaint, hereinafter referred to as paragraph two, which motion the court sustained over the objection of the cross-appellant, cross-appellant moved that the trial court withdraw the first paragraph of complaint from the consideration of the jury. The cross-appellee therefore had an opportunity to withdraw the first paragraph of the complaint which had been held deficient by the Supreme Court and elected not so to do. Notwithstanding the decision of the Supreme Court, the cross-appellee insisted on basing her cause of action on the theory of general negligence under the doctrine of *res ipsa loquitur* as alleged in the first paragraph of the complaint.

The cross-appellant further contends that, at the close of the third trial after the judgment was rendered on the directed verdict as to the issues joined in the first paragraph of complaint, which judgment was never set aside or disturbed in any manner, further proceedings on cross-appellee's paragraph two were erroneous inasmuch as cross-appellee's *sole* cause of action for personal injuries *merged in that final judgment;* and that the doctrine of *res judicata* precluded a second trial of the same cause of action which had been formerly adjudicated against the cross-appellee on the merits.

To support this contention the cross-appellant relies on the following principles of law. It is contended by the cross-appellant that the trial court erred in permitting a second trial upon the same cause of action after the rendition of a final judgment on the issues joined in cross-appellee's amended complaint, as amended by interlineation (paragraph one). That cross-appellee's cause of action for personal injuries *merged into this judgment* which merger precludes a second trial or further proceedings on paragraph two. That the cross-appellee did not move to vacate the judgment of October 25, 1960 and perfected no appeal from said judgment. That the judgment so rendered extinguished and expended the force and effect of cross-appellee's cause of action by terminating all rights and liabilities thereunder and therefore was a *final judgment.*

It is apparent from the decision of the Supreme Court in Evansville American Legion Home Association v. White, supra, that cross-appellee's amended complaint, as amended by interlineation (first paragraph), purported to state a cause of action for personal injuries based on the negligence of the cross-appellant and proceeded on the theory that an inference of negligence arose under the doctrine of res ipsa loquitur; and that after a trial on the

merits, the cross-appellee's judgment was reversed by the Supreme Court of Indiana which held that the theory of res ipsa loquitur was not applicable to the facts and circumstances of this case.

Notwithstanding this decision of the Supreme Court cross-appellee again went to trial on the first paragraph of complaint, over the objections of the cross-appellant. At the close of cross-appellee's evidence in chief in the third trial relying upon the decision of the Supreme Court in the Evansville American Legion Home Association v. White, supra, the trial court sustained the cross-appellant's motion for a directed verdict as to the issues joined in the first paragraph of the complaint. The jury returned a verdict as directed by the trial court's peremptory instruction on which the court rendered a judgment on October 25, 1960, which judgment reads in part as follows:

> "* * * It Is Therefore Considered and Adjudged by the Court that the plaintiff take nothing by way of her amended complaint as amended by interlineation and that the defendant recover of and from the plaintiff its costs and charges in this cause paid out and expended as to plaintiff's complaint as amended by interlineation."

It is the contention of the cross-appellant that said judgment disposed of the subject matter of the litigation and terminated the rights and liabilities of the cross-appellant and cross-appellee as to cross-appellee's *single* cause of action for personal injuries; and that because no motion for a new trial was filed by cross-appellee within thirty days after the rendition of the judgment, no appeal could be taken from this judgment. That because cross-appellee took no appeal from the judgment of October 25, 1960, nor made any objections to the entry of said judgment,

the judgment stands as a final determination of the rights of the parties and is a *final judgment.*

[46] It is the opinion of this Court that this position of the cross-appellant is well taken and that the judgment entered on October 25, 1960 stands as a final judgment. Kalleres et al., etc. v. Glover, Receiver (1935), 208 Ind. 472, 196 N. E. 679; Ebenezer Old People's Home of Evangelical Church et al. v. Bernhard et al. (1935), 100 Ind. App. 636, 196 N. E. 129.

In the Kalleres case the court held as follows:

> "* * * This was a final judgment. From this judgment no appeal has been taken; no motion for a new trial was filed. A final judgment is one which disposes of the subject-matter of the litigation as to the parties so far as the court in which the action is pending has power to dispose of it. * * * *If the judgment settles and concludes the rights involved, and denies the parties means of further prosecuting or defending the action, it is final. The appellants acquiesced in this finding and judgment; and, if they were correct, and we assume that they were, then any ruling made thereafter could not have been harmful to the appellants, they having no interest in the controversy and proceedings.*" (Emphasis supplied.)

It is further contended by the cross-appellant that it is a universal rule that the entry of a *final judgment* establishes in a most conclusive manner and reduces to a most authentic form that which was formerly unsettled. That, therefore, cross-appellee's sole cause of action, upon the entry of the *final* judgment, *merges* into that judgment. That the cause of action thereafter loses it vitality, expends its force and effect and can never again become the basis of a cause of action between the same parties for the reason that the power of the cause of action to

sustain rights and liabilities, if any, *merges* into the judgment rendered by a court of competent jurisdiction. That this doctrine of *merger* has its basis in the general proposition that the judgment is of higher order of security than an ordinary cause of action, and for this reason the latter is merged into the former.

The cross-appellant cites the following authorities in support of the theory of merger as the same applies to the facts in the case at bar. Mutual Benefit Life Insurance Company v. Bachtenkircher, Receiver (1935), 209 Ind. 106, 198 N. E. 81, 104 A. L. R. 1135; Bryant et al. v. Owens et al. (1953), 232 Ind. 237, 111 N. E. 2d 804; Ault v. Zehering (1871), 38 Ind. 429, 433.

It is quite apparent that cross-appellee had but one cause of action; and cross-appellee's cause of action, under the above well established principles announced in the Bryant case merged in that judgment rendered on her amended complaint, as amended by interlineation (paragraph one), which became final thirty days after her failure to move for a new trial or take any other steps to eliminate the final adjudication of her cause of action.

The next contention of the cross-appellant is that the trial court erred in permitting further proceedings with respect to and in submitting, to the jury, paragraph two of cross-appellee's complaint over the objections of cross-appellant after a final judgment was entered on cross-appellee's paragraph one. That the judgment of October 25, 1960, from the time of its rendition barred further proceedings on paragraph two is clearly demonstrated by the record under the doctrine of *res judicata.*

Specifically the cross-appellant maintains that an existing final judgment or decree rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties

or the privies in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue and adjudicated in the first suit. Hord, Trustee, Successor to Bissell, Trustee v. Bradbury (1901), 156 Ind. 20, 28, 29, 59 N. E. 27; Armstrong et al. v. Hufty (1901), 156 Ind. 606, 55 N. E. 443 (reh. den. 60 N. E. 1080).

A statement of the doctrine of res judicata generally followed by the courts of Indiana is found in Johnson v. Knudson-Mercer Co. (1906), 167 Ind. 429, at page 431, 79 N. E. 367. The court in its opinion made the following pronouncement:

> "Under the approved practice in this state a plea of former adjudication must show: (1) that the former judgment was rendered by a court of competent jurisdiction; (2) that the matter now in issue was, or might have been, determined in the former suit; (3) that the particular controversy adjudicated in the former action was between the parties to the present suit; and (4) that the judgment in the former action was rendered on the merits. * * *."

Cross-appellant contends that each essential requirement as set out above in the Johnson case is present in the case at bar.

That the former judgment was rendered by a court of competent jurisdiction and that the Warrick Circuit Court had jurisdiction over cross-appellee's cause of action is undisputed.

The requirement that the matter in issue before the trial court was, or might have been, determined in the former suit, also exists in the case at bar. The sole and only question before the trial court on the fourth trial of this action was the alleged negligence of cross-appellant with respect to the condition of a chair, which allegedly

caused cross-appellee's injuries. Cross-appellee originally proceeded on a theory of res ipsa loquitur, a theory subsequently held inapplicable to the case at bar. Evansville American Legion Home Association v. White, supra. However, cross-appellee chose to disregard the Supreme Court's decision and went to trial on the same paragraph one of the complaint, and, only after cross-appellant's objection to further proceedings on paragraph one, did cross-appellee file a second paragraph of complaint *without withdrawing paragraph one;* and only after a judgment was entered on paragraph one did the cross-appellee abandon the doctrine of res ipsa loquitur. Cross-appellee further refused to acknowledge the decision of the trial court by ignoring the judgment entered against her on October 25, 1960.

It is our conclusion that cross-appellee forced herself into a position where she had only one alternative, i. e., she had to proceed to trial on her second paragraph of complaint, after a judgment had been entered against her on the first paragraph which she could not logically and legally appeal from. That the judgment entered clearly barred any further proceedings on matters which might have been litigated under paragraph two of cross-appellee's amended complaint. Castor et ux. v. Gary Lumber Company (1942), 220 Ind. 260, 41 N. E. 2d 945; Cutler v. Cox (1828), 2 Blackf. 178; Mutual Benefit Life Insurance Company v. Bachtenkircher, Receiver, supra.

The court stated in the Castor case the following:

> "The law is well settled that where matters in issue between the parties to an action were, or might have been, litigated in a former action, such matters are considered 'forever at rest'. * * * The rule that every question, which might have been decided or litigated in a cause, will be presumed to have been decided means that every question which was within the

issues, and which under the issues might have been proved, will be presumed to have been proved and adjudicated."

It is quite apparent that every question which was within the issues presented by paragraph one of the complaint was proven and adjudicated, and consequently, the second essential element of res judicata is present in the case at bar.

The third essential element of res judicata as stated in the Johnson case, is that the particular controversy in the former suit involved the same identical parties. This presents no problem in the case at bar for from an examination of the record it clearly discloses that the parties named in both the first and second paragraphs of complaint are one and the same.

[47] The final condition precedent to the applicability of the doctrine of res judicata as announced in the Johnson case is the requirement that the former judgment was a judgment on the merits. The general rule is that a judgment in a former action or at a prior stage of the proceedings, based upon a motion for a directed verdict, is sufficient to support this application of the doctrine of res judicata. Kielczewski et al. v. Rochwalik et al. (1955), 126 Ind. App. 206, 130 N. E. 2d 785 (reh. den. 131 N. E. 2d 469); 30 Am. Jur., Judgments, Sec. 352, p. 394.

In the Kielczewski case the trial court directed a verdict and, after a subsequent trial, this court specifically held on appeal that a directed verdict was sufficient to support this doctrine of res judicata.

It appears without question that the record clearly demonstrates that each element of the doctrine of res judicata as announced in the Johnson case is present in the case at bar.

It is our opinion that the judgment entered on the third trial of this cause of action on October 25, 1960 is a final judgment; that appellee's sole cause of action thereafter merged into this final judgment; and that the doctrine of res judicata precluded a second trial of the same cause of action which had been adjudicated against the cross-appellee on the merits.

For the reasons hereinabove set forth the judgment of the trial court should be sustained.

[48] Judgment affirmed.

Bierly, C. J., and Hunter, J., concur.

Mote, J., concurs in result only.

APPENDIX D.

OPINION.

(Filed Oct. 15, 1965.)

John H. Jennings, Harold M. Wilson, Jr., Evansville, Indiana, Attorneys for Appellant and Cross-Appellee.

Bamberger, Foreman, Oswald and Hahn, Evansville, Indiana, Attorneys for Appellee and Cross-Appellant.

In the Supreme Court of Indiana.

Anna Mary White,
Appellant,
v.
Evansville American Legion Home Association,
Appellee.

Evansville American Legion Home Association,
Cross-Appellant,
v.
Anna Mary White,
Cross-Appellee.

No. 30852.

Appeal From the Warrick Circuit Court,
Hon. Lester Nixon, Special Judge.

Landis, Judge.

This cause reaches us on petition to transfer from the Appellate Court pursuant to Rule 2-23, the Appellate Court's opinion appearing in 207 N. E. 2d 820.

Appellant brought suit in the trial court for damages for personal injuries allegedly sustained as a result of appellee's negligence in furnishing appellant a defective chair in appellee's amusement hall.

The questions presented on this appeal grow out of the trial before a jury upon the second paragraph of appellant's complaint and the answers thereto filed, which resulted in a verdict and judgment for appellee-defendant.

Among the errors urged in the motion for new trial, the overruling of which is assigned as error on this appeal, are the giving of numerous instructions, two of which will have our particular attention on this appeal.

Appellant contends error was committed in the giving over objection of instruction No. 5 which was as follows:

> "The law recognizes the possibility of a mere accident, that is, an occurrence which is in no way due to the negligence of any one. Therefore, if you find from the evidence that the injuries complained of by the plaintiff in this case were the result of a mere accident, there can be no recovery by the plaintiff Anna Mary White."

In our recent opinion in the case of **Miller v. Alvey** (1965), ... Ind. ..., 207 N. E. 2d 633, we had before us an instruction on pure accident, the giving of which we held to be reversible error.

It has been argued we held in **Miller v. Alvey**, *supra*, that an instruction on "pure accident" or "unavoidable accident" was proper if there was evidence to support such an instruction. That construction is completely at variance with a careful reading of our opinion in which we pointed out that the expressions "pure accident" or "unavoidable accident" had no particular connotation in modern pleading of negligence cases, that such expressions

were ambiguous and confusing to lay jurors, their use in instructions was undesirable and unwise, and we disapproved any statements in prior decisions which could be construed to the contrary. Consistent with **Miller v. Alvey,** we must hold it was error for the court to give instruction No. 5.

Appellant has further contended on this appeal the court erred in giving instruction No. 35, which stated as follows, viz:

> "You are instructed that Anna Mary White is the only plaintiff and Evansville American Legion Home Association is the only defendant in this case, and that there is no evidence in this case that there is any other party, plaintiff or defendant, interested in its outcome."

As we further pointed out in **Miller v. Alvey,** *supra* (at p. ... of ... Ind., and pp. 637, 638 of 207 N. E. 2d):

> "Decisions of this state recognize the rule that in an action for damages growing out of an automobile accident evidence as to insurance carried by the defendant is ordinarily inadmissible not only because it is irrelevant but because it tends to prejudice the jury against the defendant. See: **Martin v. Lilly** (1919), 188 Ind. 139, 146, 121 N. E. 443, 445; **Flamion v. Dawes** (1929), 91 Ind. App. 394, 400, 169 N. E. 60, 62; See also: **City of Terre Haute v. Deckard** (1962), 243 Ind. 289, 295, 183 N. E. 2d 815, 818.
>
> "Conversely, evidence as to the failure of the defendant to carry insurance is likewise generally inadmissible on the ground of irrelevancy and as improperly tending to arouse sympathy for a defendant that he would personally have to pay the amount of any verdict the jury might return.
>
> "Similarly, instructions which call to the jury's attention these improper matters are likewise objection-

able. Instruction No. 9 given at defendant-appellee's request telling the jury that the plaintiff and the defendant were the only parties and that no one but such parties were interested in the outcome of the case is not to be commended as it was an apparent attempt to indicate to the jury that the defendant did not carry liability insurance, or the fact of insurance would have been proved by evidence introduced, when this matter was certainly not a proper or relevant issue for their consideration."

It follows therefore that it was error for the court to give instruction No. 35.

The appellant has further argued strenuously that the additional forty-three instructions tendered by appellee were so numerous and voluminous that appellant's attorney could not carefully study each of them with sufficient detail to detect all the errors therein and that it was physically impossible for the court to do so without unduly delaying and impeding the trial of the cause. The court gave in all thirty-nine instructions. We must concede that there comes a time in the tendering of instructions when their mere magnitude reaches a point beyond reason. Without fixing a limitation as to what is reasonable, we must point out that sheer numbers of tendered instructions will at times make it physically impossible for opposing attorneys or the court to perform their duty in the examination of such instructions. When that point is reached, the answer may be that this Court will not require, under such a situation, that specific objections be made to each of such tendered instructions because of the impossibility, and hold that the trial court may refuse to give such tendered instructions in its discretion when they become so numerous.

We refer to **Emery v. Beaver** (1922), 192 Ind. 471, 475, 137 N. E. 55, 56, wherein it was stated:

"Appellants claim other errors in instructions that the one to which we have referred. We are reversing on the first and most apparent error in these instructions and have not investigated the other claimed errors, because the mistakes, if there are any, will probably not occur on retrial. The instructions are too voluminous and should be limited. The court gave in all forty-five instructions, which covered twenty-seven pages of printed brief. It is hardly possible to avoid error where instructions are so prolix. Such extended instructions lead to needless repetition. This has been repeatedly condemned. **Robbins, Exr. v. Fugit**, *supra*, and cases there cited.

"The judgment is reversed, with instructions to sustain appellants' motion for a new trial."

Appellant further claims that the jury was "brainwashed" by the giving of a large number of mandatory instructions to return a verdict for the appellee. In this case the court told the jury eighteen different times, in substance, that the plaintiff could not recover or that their verdict should be for the defendant in certain events.

Mandatory instructions are not the best type of instructions to give to a jury. The jury can very easily conclude that the trial judge, for whom a jury has a great deal of respect, is urging them repeatedly to return a verdict for one of the parties. It has been said in **Baker v. Thompson** (1949), 337 Ill. App. 327, 335, 85 N. E. 2d 924, 927:

"* * * When the court tells them repeatedly that 'the plaintiff cannot recover' or that 'they must find the defendant not guilty', the jury may believe that the court is of the opinion that the verdict should be for the defendant. No one coming into our courts for redress of wrongs done them should be required to bear the onus of this disadvantage.

"In view of the foregoing, it is our opinion that the plaintiff-appellant is entitled to a new trial.

"Judgment reversed and remanded." (Our emphasis.)

See also:

Dean v. Gorby (1956), 80 Ariz. 25, 28, 292 P. 2d 199, 201;

Alexander v. Sullivan (1948), 334 Ill. App. 42, 45, 78 N. E. 2d 333, 335;

Vance v. Wells (1959), 129 Ind. App. 659, 666, 159 N. E. 2d 586, 589.

It is our opinion that a court should reluctantly give a mandatory instruction and the tendering of such instructions by a party should be avoided. Where an instruction may be framed to state or cover the principle of law without the mandatory language therein to return a verdict for one or the other of the parties, it is not error for a trial court to refuse such a tendered mandatory instruction. We need not pass specifically upon these instructions in this case for the reason that this appeal is reversed upon the points stated previously. However, we make the foregoing observations for the guidance of the trial court and the litigants in the hope that these questions may to a large extent be eliminated by the use of discretion in the trial below.

It is not necessary to discuss the remaining contentions of error, as they are not likely to arise on a retrial.

Judgment reversed with instructions to sustain the motion for new trial.

Myers and Arterburn, JJ., concur; Achor, J., concurs in result; Jackson, C. J., dissents with opinion, following.

DISSENT.

(Filed Oct. 18, 1965.)

Jackson, C. J.

I am unable to agree with the conclusion reached by the majority opinion herein. For that reason I dissent thereto.

The factual situation in the record in this case discloses that this is the fourth time that this case has been tried, the original action having been filed in the Vanderburgh Probate Court in March 1954. The cause was thereafter venued to the Warrick Circuit Court, trial was had therein before a jury resulting in a verdict in favor of the appellant in the sum of $18,000. An appeal was perfected from the judgment rendered therein to the Appellate Court and was transferred from the Appellate Court to this Court pursuant to Acts 1901, ch. 247, § 15, p. 565, § 4-209, Burns' 1946 Replacement. On December 2, 1958, this court reversed said cause and remanded the same to the trial court with instructions to grant a new trial. This Court denied rehearing therein on January 13, 1959. In the case previously tried and appealed the appellee there, appellant here, claims that the inference of negligence arose in this case under the doctrine of *res ipsa loquitur*, that contention was held invalid by this Court in said cause, and in reversing and remanding said cause with instructions to grant a new trial this Court there said "[t]he only question remaining is whether there is any evidence of negligence proximately causing the injury." This Court also answered that question on the succeeding page, which in pertinent part, reads as follows:

> "We believe there is not. In oral argument before us counsel for appellee was not able to point out any specific item of negligence. It was urged however,

that the inspection and testing of the chairs before their use should have been more thorough. There is no independent duty to make inspection upon which negligence can be based. The duty to inspect arises from knowledge of possible defects or their reasonable probability. There is no showing here that the appellant had any previous knowledge of the defective chair or had cause to suspect the chairs were defective. The undisputed evidence is to the contrary."

Evansville American Legion, etc. v. White (1959), 239 Ind. 138, 141, 154 N. E. 2d 109.

For further discussion of the proceedings heretofore had in the case now before us reference is had to **White v. Evansville American Legion Home Assn.** (1965), 207 N. E. 2d 820. In the interest of brevity we deem it unnecessary to repeat in this opinion the procedural steps heretofore had and therein set forth.

I point out that the law of the case as established by this court by its opinion of December 2, 1958 [**Evansville American Legion, etc. v. White**, *supra*] precludes recovery by the appellant herein and requires denial of transfer in the action now before us.

Under the circumstances existing in the case at bar, the previous determination and decision of this court, no new evidence as to negligence having been adduced in the case at bar, makes the giving or refusing to give instruction No. 5 immaterial because under the law of the case as heretofore enunciated this Court had determined "[i]n oral argument before us, counsel for appellee was not able to point out any specific item of negligence." **Evansville American Legion, etc. v. White**, *supra*.

Further the rule as to "pure accident" attempted to be imposed by the majority opinion in the case of **Miller v. Alvey** (1965), ... Ind. ..., 207 N. E. 2d 633, is pure

dicta, not applicable in said case for the reason that appellant there was a guest in the automobile driven by the appellee. Trial by jury was had resulting in a negative verdict denying plaintiff-appellee any recovery. Appellant there having the burden of proving wilful and wanton negligence and having failed to sustain that burden was not entitled to recover. On the state of the record in said cause, the determination by this Court that the instruction complained of constituted reversible error, was not germane to the issues to be determined on appeal and is certainly not applicable in the case at bar.

Appellant further complains that instruction No. 35 was erroneous and constituted reversible error. Again we point out that under the law of the case heretofore established by this Court, the giving of said instruction could not be harmful to the appellant, and the giving or refusal to give such instruction would be immaterial, and would be neither helpful nor harmful in the determination of the issues in this cause. Under other circumstances and in another case such an instruction might well be prejudicial, harmful or cause for reversal, but in the instant case appellant was neither harmed nor benefited by the giving of the instruction and the court did not therein commit reversible error.

We further point out that in the case now under consideration there was a judgment against the appellant and in favor of the appellee on the first paragraph of appellant's complaint as amended by interlineation. No motion for a new trial was ever filed with reference to the judgment rendered on said amended paragraph one of appellant's complaint, nor was there any appeal taken or perfected from the judgment rendered on said amended paragraph one of appellant's complaint.

In conclusion I wish to specifically call attention to the language of this Court's opinion in the former appeal

[**Evansville American Legion, etc. v. White** (1959), 239 Ind. 138, 154 N. E. 2d 109]. In pertinent part the same at page 139 reads as follows:

> "The pertinent parts of the evidence show that the appellee, Mrs. White, and her sister, attended a bingo game on the evening of the accident and bought tickets from the appellant for that purpose. After entering the hall she selected a chair at a table and pulled it out and sat down on it and the chair immediately collapsed. The chair involved was a metal folding chair put together with rivets and welding. An examination of the chair after the accident showed that the curl on the end of the rivet holding the two right legs of the chair together had been sheared or broken off. The place where the curl had come off was bright and shiny, not oxidized or corroded. It showed a recent shearing off. We do not find any dispute in the evidence as to this fact."

Again referring to the language of this Court on page 141 we find the former opinion reads in pertinent part "[t]here is no showing here that the appellant had any previous knowledge of the defective chair or had cause to suspect the chairs were defective. **The undisputed evidence is to the contrary**" [Emphasis supplied.]

The evidence adduced at the first trial and that adduced in the case at bar is, so far as the writer of this opinion is able to determine, practically identical. That being the case, in view of the former opinion of this Court [**Evansville American Legion, etc. v. White**, *supra*] the doctrine of res judicata applies and appellant here cannot recover.

Lieb v. Lichtenstein (1890), 121 Ind. 483, 23 N. E. 284;
Cutler v. Cox (1828), 2 Blackford 178;
United Oil, etc., Co. v. Ellsworth (1909), 43 Ind. App. 670, 88 N. E. 362.

The petition to transfer should be denied.

APPENDIX E.

OPINION.

(Filed Nov. 8, 1967.)

Attorneys for Appellant:

Bamberger, Foreman, Oswald and Hahn, Hulman Building, Evansville, Indiana.

Attorneys for Appellee:

John H. Jennings, Harold M. Wilson, Jr., 220 Northwest Fourth St., Evansville, Indiana.

In the
Appellate Court of Indiana,
Division No. Two.

Evansville American Legion Home Association, Appellant,
v.
Anna Mary White, Appellee.
No. 20,700.

Appeal From the Warrick Circuit Court.

Smith, J.

This is an action brought by Anna Mary White, Appellee, against Evansville American Legion Home Association, Appellant, for damages arising from personal injuries alleged to have been sustained as a result of negligence of the appellant in furnishing appellee with a defective chair in appellant's amusement hall.

This action is of long duration—it was originally filed in the Vanderburgh Probate Court in March, 1954; and

was afterwards venued to the Warrick Circuit Court wherein the following proceedings were had.

The original complaint was in one paragraph and was amended by interlineation in order to supply a prayer for damages which had been inadvertently omitted from the complaint.

The amended complaint charged that the defendant, Evansville American Legion Home Association, was a domestic corporation which owned a parcel of ground and an amusement hall located thereon in the City of Evansville, Indiana, in which said defendant sponsored and conducted Bingo games. The amended complaint specifically alleged that on February 26, 1953, the plaintiff, Anna Mary White, purchased a ticket from said defendant to be used for the purpose of playing Bingo; and that upon entering the amusement hall, she attempted to seat herself upon a chair furnished by said defendant, which chair immediately collapsed, thereby causing her personal injuries. The amended complaint further alleged that the building and the collapsed chair were both owned by said defendant and were both under the exclusive control of said defendant; and that said cause of action was one which, in the ordinary course of things, would not have arisen except for the negligence of said defendant.

To this amended complaint, as amended by interlineation, said defendant filed its answer.

Upon plaintiff's amended complaint, as amended by interlineation, and defendant's answer thereto, this cause was tried by a jury and a verdict was returned in favor of the plaintiff in the amount of $18,000.00, upon which verdict judgment was rendered and from which an appeal was taken to this court. The cause was thereafter transferred to the Supreme Court of Indiana and the judgment of the trial court was reversed by the Supreme Court with instructions to the court below to grant a new trial.

A new trial was granted and the cause proceeded a second time to trial on plaintiff's amended complaint, as amended by interlineation, and defendant's answer thereto. On the second day of said second trial the plaintiff filed an additional paragraph of complaint. Upon the third day of said trial, and, upon defendant's motion to withdraw the submission of the cause from the jury, the court withdrew submission and discharged the jury, and ordered that the trial of said cause be continued.

Paragraph two of the amended complaint, after repeating the allegations of paragraph one of the amended complaint, in substance alleged that the chair in which the plaintiff attempted to seat herself was and had been in a defective condition in that the curl of the rivet supporting the right legs of the chair had completely chipped and worn away, that the cross-brace supporting the rear legs had become unwelded, and that the rubber tip fitted to the left front leg was missing. It charged the defendant with four specific acts of negligence, namely: (1) in furnishing plaintiff with a defective chair when it knew, or in the exercise of reasonable care should have known, of the condition of the chair; (2) in failing to repair and maintain the chair; (3) in failing to test or inspect the chair; and (4) in failing to warn plaintiff of the defective condition of the chair.

On the third trial, at the close of plaintiff's evidence in chief, the trial court sustained a written motion of the defendant to direct a verdict in favor of the defendant on the issues joined in paragraph one of the amended complaint. The court, at the conclusion of all of the evidence, gave to the jury its written peremptory instruction directing the jury to find for the defendant on paragraph one of the amended complaint, and the jury thereafter returned its verdict in favor of the defendant as directed by the peremptory instruction. Thereupon the defendant

moved for judgment on said verdict, and the court rendered judgment thereon. The judgment of the court reads as follows:

> "And now the jury having rendered its verdict herein, the defendant moves the court for judgment on said verdict and now the court renders judgment thereon in accordance therewith.
>
> "It Is Therefore Considered and Adjudged by the court that the plaintiff take nothing by the way of her amended complaint as amended by interlineation and that the defendant recover of and from the plaintiff its costs laid out and expended as to plaintiff's amended complaint as amended by interlineation."

As to the remaining issues as alleged and set forth in paragraph two of plaintiff's complaint and the answers of the defendant thereto, at the close of plaintiff's evidence in chief, the defendant filed its motion for a directed verdict, which motion the trial court overruled. Thereafter the cause was submitted to the jury on paragraph two of the complaint, and the jury, failing to reach a verdict, was thereupon discharged.

Thereafter a change of venue from the judge was taken and, after qualification of a special judge, this cause was submitted the fourth time for trial. At this fourth trial, before the commencement of the trial and before the impaneling of the jury, the defendant filed its written objections to the impaneling of the jury, the submission of plaintiff's paragraph two of the complaint for trial, and to any further proceedings being had in the trial of this cause. The court overruled said written objections and the cause was thereupon submitted to trial before a jury on the issues presented by paragraph two of the amended complaint and the answers thereto.

The fourth trial resulted in a verdict and judgment for the defendant, Evansville American Legion Home Associ-

ation; and from which judgment an appeal was taken to this court.

In this appeal the defendant-appellee filed cross-errors. The defendant-appellee assigned as cross-errors the overruling of the defendant's written objections to further proceedings and submission of plaintiff's paragraph two of her complaint to the jury; that the trial court erred in giving to the jury its preliminary instruction number one over the objection of the defendant; that the trial court erred in overruling defendant's motion for a directed verdict at the conclusion of the evidence in chief for the plaintiff; that the trial court erred in refusing to give to the jury defendant's peremptory instruction number B at the conclusion of all the evidence; and that the trial court erred in refusing to give to the jury certain instructions tendered by the defendant.

The principal question raised by the cross-errors was whether or not, after an adverse final judgment rendered against the cross-appellee on the merits of paragraph two of the amended complaint, the cross-appellee is entitled to relitigate the same cause of action a second time under a second paragraph of complaint without taking any steps to set aside the adverse judgment on the first paragraph of the complaint.

The specific contentions of the cross-appellant were as follows: The cross-appellant urges that the record clearly demonstrates that paragraph one of the amended complaint for personal injuries, allegedly sustained as a result of a collapsed steel chair on the premises of the cross-appellant, was based on the theory of general negligence pursuant to the doctrine of *res ipsa loquitur*.

The Supreme Court in disposing of the first appeal in this cause held in substance that the issues of paragraph one of the amended complaint proceeded on the doctrine

of *res ipsa loquitur*, and that the facts alleged and proved did not bring the case under the doctrine of *res ipsa loquitur*. The court said as follows:

> "This is not a case of *res ipsa loquitur*. The chair was not in the exclusive possession and control of the appellant (Evansville American Legion Home Association). The chair broke at the time it was in the actual control of the appellee (Anna Mary White). The failure and breaking occurred within the open observation of the appellee (White) and view of other witnesses. No complicated machinery was involved which was enclosed, locked up, or the operation of which was excluded from the view of the appellee (White).
>
> "The doctrine of *res ipsa loquitur* is based to a large extent upon the ground that the evidence or facts concerning the operation of the injuring agency are within the special knowledge and control of the defendant and the injured party does not have free access to such information. Such is not the case here."
>
> **Evansville American Legion Home Association v. White** (1959), 239 Ind. 138, 154 N. E. (2d) 109.

The second appeal of this cause was disposed of by the Appellate Court in the case of **Anna Mary White v. Evansville American Legion Home Association** (1965), ... Ind. App. ..., 207 N. E. (2d) 820. The cause then was transferred to the Supreme Court, and Judge Landis in a majority opinion in substance held that the giving of certain instructions was erroneous and constituted reversible error. **White v. Evansville American Legion Home Association** (1965), ... Ind. ..., 210 N. E. (2d) 845. The cause was remanded to the trial court with instructions to sustain the motion for a new trial. The majority opin-

ion of the Supreme Court did not consider the errors raised in the cross-error, and said as follows:

> "It is not necessary to discuss the remaining contentions of error, as they are not likely to arise on a re-trial."

It is quite apparent that the Supreme Court in the second appeal of this cause did not disturb the judgment of October 25, 1960, rendered against plaintiff, Anna Mary White, and did not rule on the assigned cross-errors. After the cause had been remanded, and the trial court had sustained the motion for a new trial, the defendant, Evansville American Legion Home Association, filed third and fourth paragraphs of answer and a motion for summary judgment on the ground that the judgment of October 25, 1960, was a bar to further proceedings. The trial court, on the motion of plaintiff, Anna Mary White, struck defendant's third and fourth paragraphs of answer and overruled the motion for summary judgment. The case was called for trial on July 25, 1966, and was submitted to trial by jury over the objection of defendant. On July 29, 1966, a verdict was returned in favor of plaintiff, Anna Mary White, in the amount of $17,500, and a judgment, contrary to the final judgment of October 25, 1960, was rendered for said plaintiff and from which this appeal is now being prosecuted.

In this appeal the sole error assigned by appellant, Evansville American Legion Home Association, is that the trial court erred in overruling the motion for a new trial.

Appellant's motion for a new trial recites 63 specifications of error, part of which reads as follows:

> "(1) The verdict of the jury is not sustained by sufficient evidence.
>
> "(2) The verdict of the jury is contrary to law.
> • • •"

The other errors recited in the specifications of error contained in the motion for a new trial will not be considered because a consideration of the same is not necessary to dispose of this appeal.

It is the principal contention of the appellant in this appeal that the judgment of October 25, 1960, entered on the verdict of the jury upon paragraph one of the amended complaint is a final judgment which disposed of the subject matter of this litigation between appellee and appellant; that appellee has but a single cause of action for her alleged personal injuries, and a change in theory of what is but one cause of action is not sufficient to prevent the application of the doctrine of *res judicata*.

Lieb v. Lichtenstein (1889), 121 Ind. 483, 23 N. E. 284;
Cutler v. Cox (1828), 2 Blackford 178;
United Oil and Gas Company v. Ellsworth (1909), 43 Ind. App. 670, 88 N. E. 362.

Our Supreme Court in **Lieb v. Lichtenstein**, supra, stated as follows:

> "• • • It is not necessary that the form of the action shall be the same in both cases in order for the former to be a bar to the latter. It is sufficient if the question in controversy has been once litigated between the same parties."

In **Cutler v. Cox**, supra, the plaintiff brought an action in tort for deceit. The defendant therein alleged prior adjudication. The plaintiff in a prior action had impleaded the same defendant in an action in contract concerning the same river boat wherein the defendant, after a trial on the merits, recovered a verdict and judgment thereon. After an analysis of the factual circumstances set out in the first complaint formerly adjudicated and the complaint then before the court, the court stated as follows:

"From the view which we have now taken of this case, the **record does not appear to show any difference in these causes of action.** To establish the difference, the plaintiff relies on the facts, and the first suit is covenant, and the second case; that the gist of the one is contract, and of the other fraud; and that damages, covered by the last suit, have accrued since the termination of the first. These circumstances have been examined, and we find them all to be perfectly consistent with the idea, that the causes of the two suits are substantially the same. * * *" (Emphasis supplied.)

The court further concluded that there was but one wrong, i. e., furnishing a defective boat, and since the first action on contract was to redress this alleged wrong, plaintiff's sole and only right of action was extinguished in the first action on contract. As stated by the court, the judgment in the first action:

"* * * settles also the present action on the case, because the substantial causes of the two actions being the same, as has been already shown, the decision which put to an end the one, must of course be a bar to the other. * * *"

The appellant further urges that the language of the court in the **United Oil and Gas Company** case, supra, is clearly applicable to the case at bar:

"* * * appellee concedes that as to every question which might have been decided or litigated within the issues in the former suit between these same parties the judgment in such suit would be *res judicata* of any such issue in the present suit. We find no fault with this proposition, but the error of appellee is in contending that the former being a suit in equity and the present action one at law the issues in each case,

of necessity, must have been essentially or materially different. **This contention relates to the form of the action, and not to the subject matter, which is one of the controlling elements in determining the force of a plea of former adjudication.** * * *'" (Emphasis supplied.)

It is apparent from the record that the appellee sustained an injury which resulted from a collapsed chair. It is our opinion that for this alleged personal injury, the appellee has but a single cause of action whether she alleges one theory of liability or many theories of liability. The judgment of October 25, 1960 is a final judgment, and it disposed of the subject matter of the litigation and terminated the rights and liability of the appellee and the appellant as to appellee's single cause of action for personal injuries. Appellee filed no motion for a new trial after the rendition of this judgment, and, therefore, no appeal could be, nor was one, taken therefrom. It is further our opinion that since the appellee took no appeal from the judgment of October 25, 1960, nor did she make any objection to the entry of said judgment, that the judgment stands as a determination of the rights of the parties hereto and is a final judgment.

Kalleres et al. v. Glover, Receiver (1935), 208 Ind. 472, 196 N. E. 679;

Ebenezer Old People's Home of the Evangelical Church et al. v. Bernhard et al. (1935), 100 Ind. App. 636, 196 N. E. 129.

The appellant maintains that each essential requirement necessary to invoke the doctrine of *res judicata* is present in the case at bar. Though the courts of Indiana have enunciated the elements of *res judicata* with varying degrees of completeness, depending upon whether the plea was entered at successive stages of the same cause of action, in the same court or in suits brought in different

courts, a comprehensive statement of the rule is found in **Johnson v. Knudson-Mercer Company** (1906), 167 Ind. 429, 79 N. E. 367, wherein the court stated:

> "Under the approved practice of this State a plea of former adjudication must show: (1) That the former judgment was rendered by a court of competent jurisdiction; (2) that the matter now in issue was, or might have been, determined in the former suit; (3) that the particular controversy adjudicated in the former suit was between the parties to the present suit; (4) that the judgment in the former suit was rendered on the merits * * *".

The first element of the doctrine, i. e., that the judgment was rendered by a court of competent jurisdiction, is present in the case at bar; that the Warrick Circuit Court had jurisdiction of appellee's cause of action is undisputed by the parties.

The requirement of the **Johnson** case, that the matter in issue before the trial court was, or might have been, determined in the former suit, also exists in the case at bar. The sole and only question before the trial court on the second trial of this suit was the alleged negligence of appellant with respect to the condition of a chair, which allegedly caused appellee's injuries. Appellee originally proceeded on the theory of *res ipsa loquitur*— a theory subsequently held inapplicable to the case at bar. **Evansville American Legion Home Association v. White** (1959), supra.

The Supreme Court of Indiana awarded a new trial on appellant's appeal. The appellee chose to disregard the decision of the court and proceeded to trial on the same paragraph one of the complaint and only after appellant's objection to further proceedings on paragraph one did appellee file a second separate paragraph of complaint **without withdrawing paragraph one.**

It is the further contention of the appellant that the appellee, initially, was free to not only base her cause of action on any ground or theory of negligence she chose, but also to litigate any specific act or acts of negligence; that appellee apparently deemed the specific acts of negligence alleged in paragraph two and the probative force of her evidence insufficient to sustain the acts of negligence in paragraph two, for she retained paragraph one after filing paragraph two; that only after a judgment was entered on paragraph one on October 25, 1960, did she abandon the theory of *res ipsa loquitur*; that appellee further refused to acknowledge the decision of the trial court by ignoring the judgment entered against her and that no appeal from this judgment was perfected; that appellee had forced herself into a position where she had only one alternative, i. e., to proceed to trial on her second paragraph of complaint, after a judgment had been entered against her on the first paragraph of complaint; that the judgment entered bars any further proceedings on matters which were or might have been litigated under paragraph two of appellee's amended complaint.

Castor et ux. v. Gary Lumber Company (1942), 220 Ind. 260, 41 N. E. (2d) 943;

Cutler v. Cox (1828), 2 Blackford 178;

Mutual Benefit Life Insurance Company v. Bachtenkircher, Receiver (1935), 209 Ind. 106, 198 N. E. 81;

Board of Com'rs. of Adams County et al. v. State ex rel. Gibson et al. (1948), 226 Ind. 633, 82 N. E. (2d) 891.

The **Castor** case concerns an action on a note after the mortgagee sustained an adverse judgment in an action to foreclose a mortgage and failed to appeal the adverse judgment. The court stated:

" 'The law is well settled that where matters in issue between the parties to an action were, or might have

been, litigated in a former action, such matters are considered "forever at rest." * * * The rule that every question which might have been decided or litigated in a cause, will be presumed to have been decided, means that every question which was within the issues, and which, under the issues, might have been proved, will be presumed to have been proved and adjudicated.' "

Applying these principles to the factual circumstances herein, it must be presumed that every question which was within the issues of the amended complaint, as amended by interlineation, was proven and adjudicated. Therefore, it appears that the second essential element of *res judicata* is present.

The third essential element of *res judicata,* as stated in the **Johnson** case, is that the particular controversy in the former suit involved the same identical parties. This element is clearly established by the fact that the appellee, Anna Mary White, who complains of appellant, Evansville American Legion Home Association, and prays for judgment in the amended complaint, as amended by interlineation, is the same Anna Mary White who complains of appellant, Evansville American Legion Home Association, and prays for judgment in paragraph two of the complaint.

The final condition precedent to the applicability of *res judicata* is the requirement that the former judgment shall be on the merits. The general rule is that a judgment, in a former action or at a prior stage of the proceedings, based upon a motion for a directed verdict is sufficient to support the application of the doctrine of *res judicata.*

Kielczewski et al. v. Rochwalik et al. (1956), 126 Ind. App. 206, 130 N. E. (2d) 785, Reh. Den. 131 N. E. (2d) 469;

30 Am. Jur., **Judgments**, Sec. 352, p. 394.

In the **Kielczewski** case the court directed a verdict, and, after a subsequent trial, it was specifically held on appeal that a directed verdict was sufficient to support the doctrine of *res judicata.* Accordingly, the directed verdict granted on appellant's motion herein is sufficient to support the application of the doctrine of *res judicata.*

It appears without question that the record clearly demonstrates that each element of the doctrine of *res judicata* as pronounced in the **Johnson** case is present in the case at bar.

The next contention of appellant is that the entry of a **final judgment** establishes in the most conclusive manner and reduces to the most authentic form that which formerly was unsettled; that the cause of action, upon the entry of a judgment, merges into that judgment; that the cause of action loses its vitality, expends its force and effect and can never again become the basis of an action between the same parties, for the power of the cause of action to sustain rights, if any, and liabilities, if any, merges in the judgment rendered by a court of competent jurisdiction; that this **doctrine of merger** has its basis in the general proposition that the judgment is of a higher order of security than an ordinary cause of action, and for this reason the latter is merged in the former.

Mutual Benefit Life Insurance Company v. Bachtenkircher, Receiver (1935), supra;

Bryant et al. v. Owens et al. (1953), 232 Ind. 237, 111 N. E. (2d) 804;

Ault v. Zehering (1871), 38 Ind. 429, 433.

In the **Bryant** case the court considered circumstances analogous to those herein and held that where the court in one hearing finds for the petitioner on petition for custody of a child and against the cross-petitioner, the cross-petitioner cannot in a subsequent term of court retry the matter, for the reason that the judgment at the second

term is void inasmuch as **the cause of action merged in the first judgment,** and it would be improper to grant a motion for a new trial on the second judgment. The court further noted that "there is no issue left to try" on the second trial of the cause of action.

The principles announced in the **Bryant** case are unequivocally applicable to the facts at bar. Appellee's amended complaint as amended by interlineation (paragraph one) stated no cause of action upon which recovery could be had on the theory relied upon against the appellant. **Evansville American Legion Home Association v. White** (1959), 239 Ind. 138, 154 N. E. (2d) 109. However, appellee in complete disregard of the decision of the Supreme Court elected to proceed on the identical amended complaint as amended by interlineation (paragraph one) at a second trial of her alleged cause of action with the result that the trial court peremptorily instructed the jury to return a verdict in favor of appellant and a judgment thereon was entered without objection from appellee. Appellee had but one cause of action as did the cross-petitioner in the **Bryant** case. Appellee's cause of action, under the established principles announced in the **Bryant** case, merged in the judgment rendered on her amended complaint as amended by interlineation (paragraph one) which became final thirty days after her failure to move for a new trial or to take steps to eliminate the final adjudication of her cause of action.

This court is in accord with the above rule and it is our opinion that appellee's amended complaint as amended by interlineation (paragraph one) stated no cause of action upon which recovery could be had on the theory relied upon against the appellant.

It is further the contention of the appellant that no litigant, including the appellee, is permitted to try a case in a piecemeal fashion.

Smith v. Smith (1936), 102 Ind. App. 431, 200 N. E. 262;

The Indiana, Bloomington and Western Railway Company v. Koons (1885), 105 Ind. 507, 510, 5 N. E. 549.

To paraphrase the language used in the **Koons** case, "a party will not be permitted to present by piecemeal, in successive suits, claims which grow out of a 'single accident' which might have been litigated and determined when the suit was first brought" (in the case at bar, after the decision of the Supreme Court). "In such a case the judgment in the first suit will be a conclusive merger of all the plaintiff's rights under the alleged cause of action."

Appellant maintains, in the light of the above cited cases, that the appellee's sole cause of action, merged in the judgment of October 25, 1960, leaving her no ground on which to base any subsequent proceedings. Thus, the trial court's subsequent submission of paragraph two of appellee's complaint, after final judgment entered on paragraph one, was completely in error.

With this contention of the appellant the court is in agreement, and it is our opinion that the trial court erred in submitting paragraph two of appellee's complaint after final judgment had been entered on paragraph one.

In summary, it is our opinion that the appellee has but one cause of action regardless of the number of theories advanced. Through her own neglect and failure to take cognizance of the Supreme Court decision in **Evansville American Legion Home Association v. White** (1959), supra, appellee caused a final judgment to be entered against her on one theory of her complaint, and her sole cause of action merged into that judgment upon entry thereof. That there has been a judgment on the merits, in a controversy between the parties to the present action, by a court of competent jurisdiction and the judgment entered, barred any further proceedings on the matters subject to litigation under paragraph two of appellee's

complaint. The doctrine of *res judicata* prevents appellee from proceeding once again to trial on a cause of action which has been previously adjudicated against her on the merits.

Hord, Trustee, Successor to Bissell, Trustee, v. Bradbury (1901), 156 Ind. 20, 28, 29, 59 N. E. 27;
Armstrong et al. v. Hufty (1901), 156 Ind. 606, 60 N. E. 1080;
Johnson et al. v. Knudson-Mercer Company (1906), 167 Ind. 429, 79 N. E. 367.

Appellant further maintains that the very same question was decided by this court in favor of the appellant on the last appeal by assignment of cross-errors.

White v. Evansville American Legion Home Association (1965, Indiana Appellate Court), 207 N. E. (2d) 820, 841-845.

The cause was subsequently transferred to the Supreme Court and reversed because of error in the giving of certain instructions. **White v. Evansville American Legion Home Association,** supra.

It is our opinion that the Supreme Court in the above cited case did not **consider or decide** the question presented in this appeal and which was presented by appellant's cross-appeal. It is further our opinion that this court is free to decide this question as it did on the last appeal, since questions which might have been but were not decided on a previous appeal do not become "the law of the case".

Egbert v. Egbert et al. (1956), 235 Ind. 405, 414, 132 N. E. (2d) 910;
Alerding et al., Executors v. Allison (1908), 170 Ind. 252, 83 N. E. 1006.

The Supreme Court in the **Egbert** case criticized past Indiana decisions which did not specifically limit the rule

of law of the case to questions actually decided on a past appeal and proclaimed the rule to be as follows:

> "* * * The rule of the law of the case is to be distinguished from the rules of res judicata. 'The rule of "the law of the case," thus limited to the point or points considered and decided on the first appeal, meets our full approval. But we cannot agree to the claim of appellee's counsel, that "the law of the case" precludes us from considering and deciding now, on the second appeal of this cause, any questions which might have been, but were not, considered and decided as the case was presented on the first appeal. Such claim seems to us unreasonable, although we are aware that it is supported by many respectable authorities, and even by the language used in some of the reported opinions of this court.' Davis v. Krug (1884), 95 Ind. 1, 9. Questions which might have been but were not considered or decided in the first and prior appeal do not become the law of the case. 'Only points decided become the law of the case.' Wine v. Woods (1902), 158 Ind. 388, 391, 63 N. E. 759."

It is further our opinion that the opinion of the Supreme Court in **White v. Evansville American Legion Home Assqciation** (1965), supra, did not become "the law of the case" with respect to the question of *res judicata,* since this question was never considered or decided by the Supreme Court.

It is further our opinion that the question raised in the **Egbert** case and the question herein presented can only be classified as *sui generis.* However, the peculiar facts which have brought into play the principles of merger and *res judicata* are the responsibility of the appellee alone. It was the appellee who insisted on proceeding under a theory of *res ipsa loquitur* during the second trial of this cause after the Supreme Court had specifically held that

the doctrine was not applicable. The appellee could still have avoided the predicament in which she now finds herself by several means, as follows:

1. Appellee was given an opportunity to withdraw paragraph one of the amended complaint and could have done so at any time prior to the entry of the directed verdict and judgment thereon;

2. Appellee could have objected to the entry of the judgment; and

3. Appellee could have appealed from the judgment entered on the amended complaint as amended by interlineation (paragraph one).

Appellee refused to do any of the above, and it is our opinion that the doctrine of **merger** and *res judicata* prevented the trial court from entering judgment in favor of appellee.

The appellant maintains that "if the decision below is affirmed on this appeal, we will have two diametrically opposed judgments entered in one cause of action—a judgment in favor of appellant and a judgment in favor of appellee. Such a result would, to say the least, give this case a place of its own in the history of Indiana jurisprudence."

All assignments of error contained in the motion for a new trial have been considered. Those not covered by the foregoing opinion are regarded as unimportant and not necessary to the determination of this appeal.

Judgment reversed with instructions to the trial court to grant a motion for a new trial. The trial court is further instructed to overrule appellee's motion to strike appellant's third and fourth paragraphs of answer.

Pfaff, C. J., and Bierly and Cook, JJ., concur.

APPENDIX F.

MEMORANDUM OF ORDER.

(Letterhead of Clerk of Supreme and Appellate Courts, State of Indiana, Indianapolis, Indiana.)

Evansville American Legion Home Association

vs.

Anna Mary White.

No. 20700.

You are hereby notified that the Supreme Court has on this day denied Appellee's Petition to Transfer.

Supreme Court Justices Jackson, Lewis, Hunter, Mote and Arterburn.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

Witness my name and the seal of said Court, this 7th day of February, 1968.

(Seal)

Kendal E. Mathews,
Clerk Supreme and Appellate Courts.

APPENDIX G.

MEMORANDUM OF ORDER.

(Letterhead of Clerk of Supreme and Appellate Courts, State of Indiana, Indianapolis, Indiana.)

Evansville American Legion Home Assoc. ●

vs. No. 20700.

Anna Mary White.

You are hereby notified that the Supreme Court has on this day denied appellee's petition for rehearing. Lewis, C. J.

Supreme Court Justices Jackson, Lewis, Hunter, Mote and Arterburn.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

Witness my name and the seal of said Court, this 21st day of March, 1968.

(Seal)

Kendal E. Mathews,
Clerk Supreme and Appellate Courts.